Utah Law Review

Volume 2020 | Number 5 Article 2

1-2021

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A PATH TO DATA-DRIVEN HEALTH CARE ENFORCEMENT

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Abstract

The Department of Justice ("DOJ") has a long-stated goal of encouraging companies to engage in what the author refers to as "compliant behaviors"—maintenance of an effective pre-existing compliance program, post-enforcement adoption of an effective compliance program, cooperation with a government investigation, and self-disclosure of misconduct. Substantial DOJ guidance over the past two decades, along with the concrete incentive structure of the United States Sentencing Guidelines, have increasingly made clear to organizations when and how such behaviors will be rewarded in criminal matters. Recently, DOJ has made transparency and clarity regarding the benefit of compliant behaviors a priority in calculating and announcing criminal resolutions. With respect to civil False Claims Act ("FCA") settlements, however, meaningful formal DOJ guidance on the effect of compliant behavior only arrived in 2019. More significantly, DOJ's treatment of compliant behavior in civil cases, in contrast to that in the case of criminal resolutions, has appeared inconsistent and certainly opaque. This lack of clear implementation philosophy is particularly problematic in the area of health care, an industry for which the FCA is the primary tool for government action in response to misconduct. While much has been written on the systemic efficiencies—or lack thereof—that DOJ's enforcement practices bring to the activities of regulated industries, this is the first article to use data to ask whether DOJ has a governing practice concerning civil settlements, or whether instead, its settlement practices fail to match its stated principles.

For decades, even as resources devoted to health care compliance by market participants have skyrocketed and DOJ has pressed corporate entities to engage in compliant behaviors, the health care industry and the defense bar have expressed skepticism regarding the actual payoff they might realize by engaging in those behaviors. DOJ's response has been a

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series of public statements amounting to, "trust us, they matter." Until now, the health care industry has been without any mechanism to test those assurances.

In response to changes in the tax code, however, DOJ made adjustments in 2018 to its practice of disclosing information regarding FCA settlements—changes that have shaken loose data that provides an opportunity to test DOJ's claims of rewarding compliant behaviors in civil cases. The author is the first and thus far the only person to have identified and analyzed this newly available data. Examination of this data demonstrates that wide-ranging, structural changes are necessary. The data raises substantial questions about: the quantum of credit given for cooperation; conduct DOJ values in resolving FCA cases; and the degree of consistency in cases settled by U.S. Attorney's Offices across the country. For example, analysis of the data reveals inconsistent benefits for cooperation. Cases where defendants self-disclosed misconduct or cooperated were often not treated more leniently than cases where defendants did not self-disclose or cooperate, and a review of more than 100 settlements did not find a single instance in which DOJ purported to give an entity a reduction based on its pre-existing compliance program. At the same time, DOJ appears to be greatly rewarding defendants for agreeing to settle—highlighting concerns both with regard to whether DOJ is achieving adequate deterrence and with regard to whether the FCA's potential penalties are coercing settlements. And the data appears to show significant variation in settlement positions depending on the identity of enforcing DOJ component, with cases handled by DOJ's Civil Division in Washington, D.C. treated more leniently than cases handled solely by U.S. Attorney's Offices across the country.

With the data now public—and at a moment in time when DOJ is emphasizing transparency and clarity in rewarding compliant behaviors in the resolution of criminal cases—DOJ's corporate health care enforcement regime is at a crossroads. Without change in this area, DOJ risks undercutting its efforts at encouraging compliant behaviors in one of DOJ's primary enforcement areas. No longer left in the dark about the impact of compliant behaviors in calculating FCA resolutions, the health care industry may be less likely to continue investing in compliance programs at the same rate, to cooperate with government investigations, and especially to self-disclose misconduct to the government. The analysis reveals that a detailed structure of DOJ's calculations in FCA settlements, with calculations transparent in each FCA resolution, is needed to accomplish DOJ's goal of encouraging cooperation and investment in compliance programs, as well as to provide an assurance that like cases are treated alike.

INTRODUCTION

The Department of Justice ("DOJ") has long stated its desire to incentivize companies to engage in what I refer to as "compliant behaviors"—having an effective pre-existing compliance program, adopting an effective compliance program as a remedial measure, cooperating with a government investigation, and self-disclosing misconduct to the government. Scholars have raised questions as to the effectiveness and costs of rewarding compliant behaviors, and some have argued DOJ should cease its efforts to reward compliant behaviors.[1] This Article does not weigh into that debate, and instead addresses the current state of enforcement. Whether right or wrong to do so, DOJ has decided that compliant behaviors are beneficial and should be rewarded. When it comes to the handling of criminal investigations and prosecutions, substantial DOJ guidance over the past two decades, alongside the concrete incentive structure of the United States Sentencing Guidelines, have increasingly made clear to organizations when and how such behaviors will be rewarded. When it comes to the impact of compliant behaviors on the resolution of civil False Claims Act ("FCA") settlements, however, meaningful DOJ guidance only arrived in 2019, and it still lacks a clear incentive structure. This is particularly problematic in the area of health care, an industry for which the FCA is the primary tool for government action in response to corporate misconduct.

Until recently, the lack of a visible structure for resolution of civil cases was masked by the fact that the system required no transparency from DOJ as to the bases for its FCA resolutions.[2] In 2018, however, that changed, forcing DOJ to give a glimpse behind the curtain. Because a change in the tax law now required DOJ to begin revealing what portion of resolutions constitutes restitution and what portion constitutes additional punishment beyond paying restitution, the law effectively requires DOJ to reveal how harshly each act of corporate misconduct is treated. This Article analyzes more than 115 corporate health care FCA settlements between February 2018 (when DOJ began including the restitution information in FCA

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[1] *See, e.g.*, Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 688 (1997) (examining various regimes for punishing corporate defendants, including that of the United States Sentencing Guidelines, and concluding that they do not "adequately create proper incentives for companies to monitor, investigate, and report employee wrongdoing"); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2127 (2016) (arguing that government should reduce investigation costs by requiring companies to install compliance functions and that "government enforcement agents have structural incentives to mandate excessive compliance" (citing Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 991–99) (2009)); Miriam Hechler Baer, *Cooperation's Cost*, 88 WASH. UNIV. L. REV. 903, 905–10 (2011) (exploring the costs and benefits of cooperation credit in cases involving individuals).

[2] *See* Amendment of 1986 Code, Pub. L. No. 115-97, § 13306, 131 Stat. 2054, 2126–28 (2017) (requiring DOJ to provide, for the first time, information regarding the portion of civil settlement agreements which constitute restitution).

agreements) and June 2019—an analysis of particular salience given DOJ's May 2019 guidance regarding benefits for compliant behaviors in FCA cases.

Based on this analysis, detailed below, there is reason for skepticism that DOJ is valuing compliant behaviors in the way it claims and that DOJ utilizes any consistent framework in resolving FCA cases. Examination of data reveals a lack of uniformity in resolving FCA cases across different DOJ components and an absence of evidence that DOJ rewards compliant behaviors. Instead, the resolutions demonstrate that DOJ, while failing to reward compliant behaviors, has routinely discounted penalties without explanation and to a far greater extent than is seen in criminal resolutions in exchange for defendants' agreement to settle.

The reality exposed by the forced transparency resulting from the tax law change seems to stand in stark contrast to DOJ's May 2019 FCA guidance. This gap is more notable because it comes in the midst of a sustained and well-publicized effort by DOJ's Criminal Division to provide true transparency as to the impact of compliant behaviors – in particular, cooperation and self-disclosure. With industry and the defense bar increasingly expecting proof from DOJ, and the limited FCA data now available providing fuel for those skeptical of DOJ's assurances, DOJ's corporate health care enforcement is at a crossroads, creating a pressing need for a rethinking of DOJ policy in this critical area.

I. GUIDANCE RE: IMPACT OF COMPLIANT BEHAVIORS IN CRIMINAL RESOLUTIONS

In criminal cases, there is substantial guidance and transparency as to the impact of compliant behaviors both from within DOJ and through the U.S. Sentencing Guidelines. In fact, it is primarily through that DOJ-generated, criminal-focused guidance that the government has made clear it views compliant behaviors as significant in the fight against fraud and believes that the way to encourage compliant behaviors is to take them into account in determining the appropriate outcome when fraud is uncovered.

A. Principles of Federal Prosecution of Business Organizations

Most significantly, the Justice Manual ("JM")[3]—a publicly available resource containing DOJ policies and procedures—makes clear that compliant behavior should be a significant factor in determining whether and in what form to bring a criminal prosecution against a business organization. The Principles of Federal Prosecution of Business Organizations[4] were added to the JM following the

[3] U.S. DEP'T OF JUST., JUSTICE MANUAL (2018), https://www.justice.gov/jm/justice-manual [https://perma.cc/ZLG8-LPP9] ("The JM was previously known as the United States Attorneys' Manual (USAM). It was comprehensively revised and renamed in 2018."). For simplicity, this Article refers to the document as the "JM," even when referring to time periods when it was known as the "USAM."

[4] *Id.* § 9-28.000 (2008) [hereinafter Corporate Prosecution Principles], https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations

publication of an August 2008 memorandum from Deputy Attorney General Mark Filip[5], which also updated the Corporate Prosecution Principles. The Corporate Prosecution Principles describe the factors criminal prosecutors should consider when investigating a corporate entity and making determinations regarding whether to bring charges and when negotiating potential resolutions. The Corporate Prosecution Principles regularly mark the framework for presentations by defense counsel to prosecutors and for internal memoranda by DOJ prosecutors seeking approval to charge or resolve cases.

The Corporate Prosecution Principles section of the JM notes that "the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches," but that there are additional factors present when considering business organizations.[6] The section goes on to list eleven factors:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;

3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;

4. the corporation's willingness to cooperate in the investigation of its agents;

5. the existence and effectiveness of the corporation's pre-existing compliance program;

[https://perma.cc/BHY8-ZAMB].

[5] Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Just., on Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008) [hereinafter Filip Memo], https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf [https://perma.cc/5GZE-52EL]. The Principles of Federal Prosecution of Business Organizations are commonly referred to as the "Filip Factors"—an ironic development, given that the Filip Memo noted that his revision of the prior Principles of Federal Prosecution of Business Organizations "was truly a collective effort," and "should not bear the name of any particular individual at the Department, as prior iterations sometimes became known," lest they be read to "imply[] that Department policy is subject to revision with every changing of the guard." *Id.* at 2.

[6] Corporate Prosecution Principles, *supra* note 4, § 9-28.300(A).

6. the corporation's timely and voluntary disclosure of wrongdoing;

7. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

8. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as the impact on the public arising from the prosecution;

9. the adequacy of remedies such as civil or regulatory enforcement actions;

10. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

11. the interests of any victims.[7]

Of the eleven Corporate Prosecution Principles, four aim squarely at rewarding compliant behaviors: "the corporation's willingness to cooperate in the investigation of its agents," "the existence and effectiveness of the corporation's pre-existing compliance program," "the corporation's timely and voluntary disclosure of wrongdoing," and the corporation's remedial efforts "to implement an effective compliance program or to improve an existing one."[8]

Originally issued more than 20 years ago—in June 1999 through a memorandum from Deputy Attorney General Eric Holder—the Corporate Prosecution Principles have, through numerous iterations, generally listed the same factors in place today.[9] The Holder Memo instructed prosecutors to consider each of the four compliant behaviors, as did later iterations issued by Deputy Attorney General Larry D. Thompson in 2003, by Deputy Attorney General Paul J. McNulty in 2006, the Filip Memo in 2008, and another iteration issued by Deputy Attorney General Sally Quillian Yates in 2015 in the context of DOJ's efforts to increase "Individual Accountability for Corporate Wrongdoing."[10]

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[7] *Id.*; *see also id.* §§ 9-28.400–9-28.1300.

[8] *Id.* § 9-28.300; *see also id.* §§ 9-28.700, 9-28.800, 9-28.900, 9-28.1000.

[9] Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Just., on Bringing Criminal Charges Against Corporations to All Component Heads & U.S. Attorneys (June 16, 1999) [hereinafter Holder Memo], https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF [https://perma.cc/K2CY-E3XJ].

[10] *Id.*; Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Just., on Principles of Federal Prosecution of Business Organizations to Heads of Dep't

The changes from the Holder Memo through today centered around DOJ's expectations for cooperation, with each iteration making adjustments to the cooperation factor while retaining all four compliant behaviors.[11]

Components & U.S. Attorneys (Jan. 20, 2003) [hereinafter Thompson Memo], https://web.archive.org/web/20030403065859/http://www.usdoj.gov/dag/cftf/business_organizations.pdf [https://perma.cc/Q6Q5-JYZG]; Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Just., on Principles of Federal Prosecution of Business Organizations to Heads of Dep't Components & U.S. Attorneys (Dec. 12, 2006) [hereinafter McNulty Memo], https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf [https://perma.cc/8DE9-CM2P]; Filip Memo, *supra* note 5; Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Just., on Individual Accountability for Corporate Wrongdoing to Assistant Att'ys Gen., Dirs., & U.S. Att'ys (Sept. 9, 2015) [hereinafter Yates Memo], https://www.justice.gov/archives/dag/file/769036/download. [https://perma.cc/JWS6-7WQG]. The Holder Memo listed eight principles for consideration. Principle 10 was added in 2003, and in 2015 the two related factors addressing cooperation —"the corporation's willingness to cooperate in the investigation of its agents," and "the corporation's timely and voluntary disclosure of wrongdoing"—were broken out into two separate principles, after having been combined into a single principle in prior versions of the Corporate Prosecution Principles. Salley Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Just., Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Conference (Nov. 16, 2015), *in* JUST. NEWS (Sept. 29, 2016), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0 [https://perma.cc/QYX6-MZCW].

[11] The Holder Memo and Thompson Memo directed prosecutors to take into account whether the entity under investigation waived the attorney-client privilege and/or advanced legal fees to employees who had engaged in misconduct. DOJ's consideration in evaluating cooperation of entities' decisions regarding waiver of attorney-client privilege and regarding advancing fees to employees generated substantial controversy, and eventually a federal district court decision holding that prosecutors had violated the Fifth and Sixth Amendment rights of employees by causing their employer, KPMG, to condition payment of their legal fees on their willingness to be interviewed by the government. *See* United States v. Stein, 435 F. Supp. 2d 330, 367–82 (S.D.N.Y. 2006), *aff'd on other grounds*, 541 F.3d 130, 136 (2d Cir. 2008). Also in 2006, the Senate considered the Attorney Client Privilege Protection Act of 2006, which sought to prevent prosecutors from considering the waiver of attorney-client privilege in making charging decisions. S. 30, 109th Cong. §§ 2–3 (2006). Although the proposed bill was not passed by the Senate, the McNulty Memo soon followed, instructing prosecutors that they could seek privileged information only "when there is a legitimate need for the privileged information to fulfill their law enforcement obligations." McNulty Memo, *supra* note 10. The McNulty Memo reaffirmed the four compliant behaviors as factors to be considered, and again focused on cooperation in revising the Corporate Prosecution Principles. *Id*. The Filip Memo for a third time amended the Corporate Prosecution Principles to make adjustments to the cooperation factor. Filip Memo, *supra* note 5. The Filip Memo again retained all four compliant behaviors, while focusing its amendments on cooperation and removing consideration of privilege waiver and legal fee advancement from the cooperation analysis in making charging decisions. *Id.*; *see also* Press Release, U.S. Dep't of Just., New Compliance Counsel Expert Retained by the DOJ Fraud Section (Nov. 3, 2015), https://www.justice.gov/criminal-fraud/file/790236/download

B. Additional DOJ Guidance re: Compliant Behaviors

In recent years, DOJ has only increased its public emphasis on compliant behaviors and statements tying compliant behaviors to increased DOJ leniency. Through numerous statements and issuance of guidance, DOJ has sought to incentivize companies to engage in compliant behaviors by providing guidance to industry as to how DOJ would 1) evaluate and reward investment in compliance programs; and 2) evaluate and reward cooperation and self-disclosure. DOJ has emphasized its belief in the impact of transparency:

> Transparency about the types of corporate practices and programs that the Department of Justice values has the . . . benefit of reinforcing real-world outcomes that we desire as an institution. By demystifying the considerations commonly confronted by white-collar prosecutors, our hope is that companies will have the information and security they need to invest fully in compliance on the front end, and to make good decisions in the face of misconduct on the back end.[12]

As to corporate compliance programs, DOJ has taken a number of steps to send the message to industries that evaluating compliance programs—to determine whether and how much reward should be given—is a priority for DOJ. In November 2015, DOJ announced that the Fraud Section of DOJ's Criminal Division retained a full-time compliance expert to aid DOJ's evaluation of compliant behavior to inform criminal prosecution decisions.[13] While DOJ announced the elimination of the

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[https://perma.cc/5QVY-A3ES]. The Filip Memo noted its "principal revisions . . . concern[ed] what measures a business entity must take to qualify for the long-recognized 'cooperation' mitigating factor, as well as how payment of attorneys' fees by a business organization for its officers or employees, or participation in a joint defense or similar agreement, will be considered in the prosecutive analysis. Much of the remainder of the [Corporate Prosecution] Principles [were left] unchanged." Filip Memo, *supra* note 5.

[12] Brian A. Benczkowski, Assistant Att'y Gen., U.S. Dep't of Just., Remarks at the Global Investigations Review Live New York (Oct. 8, 2019), *in* JUST. NEWS (Oct. 8, 2019) [hereinafter Global Investigations Review Live], https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-global-investigations [https://perma.cc/2ANT-Y297].

[13] U.S. Dep't of Just., New Compliance Counsel Expert Retained, *supra* note 11 ("Among her duties as a consulting expert, [Hui] Chen will provide expert guidance to Fraud Section prosecutors as they consider the enumerated factors in the United States Attorneys' Manual concerning the prosecution of business entities, including the existence and effectiveness of any compliance program that a company had in place at the time of the conduct giving rise to the prospect of criminal charges, and whether the corporation has taken meaningful remedial action, such as the implementation of new compliance measures to detect and prevent future wrongdoing. Chen will help prosecutors develop appropriate benchmarks for evaluating corporate compliance and remediation measures and communicating with stakeholders in setting those benchmarks.").

position in October 2018, DOJ simultaneously announced a program to create "a workforce better steeped in compliance issues across the board," through a "combination of diverse hiring and the development of targeted training programs."[14] In February 2017, DOJ's Criminal Division published guidance as to what DOJ looks for in evaluating corporate compliance programs and then published an updated version of that guidance in April 2019, and then again in June 2020.[15] While the Evaluation of Corporate Compliance Programs noted that many of its topics also appear in the JM, the U.S. Sentencing Guidelines, or other sources, its publication represented another clear attempt on the criminal side to increase guidance and transparency to encourage compliant behavior.

DOJ guidance has been perhaps even more prevalent when it comes to the standards and benefits regarding cooperation and self-disclosure. In addition to the repeated adjustments to the Corporate Prosecution Principles described above, DOJ has issued supplementary guidance. The Yates Memo identified six steps DOJ would take to "strengthen [DOJ's] pursuit of individual corporate wrongdoing," the first of which focused on detailing under what circumstances corporations can qualify for cooperation credit under the Corporate Prosecution Principles.[16]

As it has focused on Foreign Corrupt Practices Act ("FCPA") matters, DOJ has formalized additional incentives to engage in compliant behavior, focusing on cooperation and self-disclosure, while also reinforcing DOJ's commitment to rewarding remedial investments in compliance programs. In an effort to increase transparency regarding the benefits of cooperation and self-disclosure even beyond that flowing from the Corporate Prosecution Principles, described above, and U.S. Sentencing Guidelines guidance, detailed below (both of which, of course, apply with equal force to FCPA maters), DOJ supplemented the JM with the FCPA Resource Guide in 2012 (published in collaboration with the SEC).[17] It also created the FCPA Pilot Program in 2016, and then formalized the FCPA Pilot Program into the Corporate Enforcement Policy, also inserting it into the JM in 2018, all with an eye towards incentivizing compliant behavior through increased guidance and transparency.[18]

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[14] Brian A. Benczkowski, Assistant Att'y Gen., U.S. Dep't of Just., Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance (Oct. 12, 2018), *in* JUST. NEWS (Oct. 13, 2018) https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program [https://perma.cc/P2GB-AD4X].

[15] *See* CRIM. DIV., U.S. DEP'T OF JUST., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (2020), https://www.justice.gov/criminal-fraud/page/file/937501/download [https://perma.cc/Z2RH-WY9P].

[16] Yates Memo, *supra* note 10.

[17] *See* U.S. DEP'T OF JUST. & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), https://www.justice.gov/sites/default/files /criminal-fraud/legacy/2015/01/16/guide.pdf [https://perma.cc/PFR9-8AB8].

[18] Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., Remarks at 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017) *in* JUST. NEWS (Nov. 29,

Under the Corporate Enforcement Policy (which DOJ announced in 2018 would be binding as to FCPA matters and used as "nonbinding guidance" by the Criminal Division in other areas of white-collar enforcement beyond the FCPA),[19] companies who voluntarily self-disclose misconduct, cooperate, and appropriately institute remedial measures, will presumptively receive a declination of prosecution, absent aggravating circumstances involving the seriousness of the offense or the nature of the offender.[20] Even where a criminal resolution is warranted for a company that makes a voluntary self-disclosure, DOJ will apply the FCPA Corporate Enforcement Policy and agree to or recommend to a sentencing court a 50% reduction off of the low end of the U.S. Sentencing Guidelines fine range, and generally will not require the appointment of an outside monitor.[21] Where the company does not make a self-disclosure but does cooperate and appropriately remediate, DOJ will support up to a 25% reduction off of the low end of the U.S. Sentencing Guidelines fine range.[22] Notably, as detailed below, these deductions are in addition to the already substantial role compliant behaviors play in calculating the U.S. Sentencing Guidelines fine range.

2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign [https://perma.cc/SFX3-BU97] ("We expect the new policy to reassure corporations that want to do the right thing. It will increase the volume of voluntary disclosures, and enhance our ability to identify and punish culpable individuals. . . . We want corporate officers and board members to better understand the costs and benefits of cooperation.").

While operating outside of DOJ, the SEC has similarly sought to provide guidance that compliant behavior will be rewarded. The SEC has done this through a report (commonly referred to as the Seaboard Report) in 2001, which sought to explicitly detail its methodology for determining penalties, U.S. SEC. & EXCH. COMM'N, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENOFORCEMENT DECISIONS (2001), https://www.sec.gov/litigation/investreport/34-44969.htm [https://perma.cc/L6MF-LLY7]; a statement commonly referred to as the Penalties Statement in 2006, U.S. SEC. & EXCH. COMM'N, STATEMENT OF THE SEC CONCERNING FINANCIAL PENALTIES (2006), https://www.sec.gov/news/press/2006-4.htm [https://perma.cc/GSL5-JH9K]; a cooperation initiative in 2010, which among other things made the Seaboard Report part of the SEC Enforcement Manual, Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), https://www.sec.gov/news/press/2010/2010-6.htm [https://perma.cc/N3MX-ZFFW]; as well as publication of the FCPA Resource Guide in 2012. U.S. DEP'T OF JUST. & U.S. SEC. & EXCH. COMM'N, *supra* note 17.

[19] John P. Cronan, Principal Deputy Assistant Att'y Gen., Remarks at Practising Law Institute Event (Nov. 28, 2018), *in* JUST. NEWS (Nov. 28, 2018), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-delivers-remarks-practising-law [https://perma.cc/Z89T-Q7BE].

[20] U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-47.120(1) (2019), https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977 [https://perma.cc/83SR-R5KJ].

[21] *Id.*

[22] *Id.* § 9-47.120(2).

In addition to referencing the Corporate Prosecution Principles, the Corporate Enforcement Policy provides additional, detailed guidance regarding what constitutes self-disclosure, cooperation, and remediation.[23] The defense bar has understandably viewed these various guidance documents as efforts "to promote predictability and transparency in white collar enforcement and to clarify the benefits of a responsible corporate approach to misconduct . . . ."[24] In formalizing the Corporate Enforcement Policy into the Justice Manual, DOJ made clear it intended to increase transparency with the hope of encouraging compliant behaviors, in particular voluntary disclosures.[25]

C. United States Sentencing Guidelines

The factors included in the Corporate Prosecution Principles and reinforced through additional DOJ guidance are, of course, far from novel. Most notably, several of the factors are also included in the U.S. Sentencing Guidelines. While the Corporate Prosecution Principles provide factors to be considered, they are explicitly intended to aide in a process that remains largely art and not science, noting that prosecutors have "substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law."[26]

The U.S. Sentencing Guidelines go a step further, detailing explicit and concrete calculations as to Determining the Fine for Organizations. Under the U.S. Sentencing Guidelines, a series of factors are used to arrive at a Culpability Score, which then translates to a minimum (as low as 0.05) and maximum (as high as 4.0) fine multiplier, each of which is multiplied by the base fine (frequently the gain to the organization from the offense or the loss from the offense caused by the organization) to create the minimum and maximum of the guideline fine range.[27]

Factors related to compliant behavior are central to calculation of the Culpability Score. As a result, a potential guideline fine can decrease by 40–80% based on cooperation with the government's investigation, 60–120% based on the existence of a pre-existing effective compliance program, 100–200% based on a

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[23] *Id.* § 9-47.120(3).

[24] John F. Savarese, Ralph M. Levene & David B. Anders, *The DOJ's Updated Guidance on Corporate Compliance Programs*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REGULATION (May 14, 2019), https://corpgov.law.harvard.edu/2019/05/14/the-dojs-updated-guidance-on-corporate-compliance-programs/ [https://perma.cc/XSL7-HSEH].

[25] Rosenstein, *supra* note 18 ("[The Corporate Enforcement Policy] will increase the volume of voluntary disclosures . . . .").

[26] U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-28.200, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/EHU9-RV2K] (revised July 2020).

[27] U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.4–2.7 (2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf [https://perma.cc/SS76-9GJU].

self-disclosure, or 160–320% in the case of an entity with a pre-existing effective compliance program and a self-disclosure.[28]

Notably, the calculations related to compliant behaviors are significantly greater than adjustments made based on simple acceptance of responsibility. The U.S. Sentencing Guidelines multiplier reduction for acceptance of responsibility is only 20–40%—smaller than adjustments based on the size of the organization and the role within the organization of the responsible individuals.[29] Under the U.S. Sentencing Guidelines, the reduction for a defendant organization's self-disclosure is five times the reduction for mere acceptance of responsibility, and the reductions for cooperation or for having had an effective compliance and ethics program in place are two times and three times the acceptance of responsibility deduction, respectively.[30]

Numerous factors, including considerations mirroring sentencing factors detailed in 18 U.S.C. §§ 3553(a) and 3572(a), are then used to determine the amount of a fine within (or outside of) the applicable guideline range.[31] In the context of a significant corporate resolution, the Culpability Score deductions relating to compliant behavior can easily make a concrete and visible difference of tens or even hundreds of millions of dollars in a criminal resolution.[32]

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[28] *Id.* Cooperation with the investigation leads to a deduction of 2 points from the culpability score, having an effective pre-existing compliance program leads to a deduction of 3 points, and self-disclosure a deduction of 5 points. *Id.* § 8C2.5(f)(1),(g)(1), (g)(2). Based on the Minimum and Maximum Multipliers listed in U.S.S.G., *id.* § 8C2.6, a 2-point deduction would reduce the minimum multiplier by 0.4 and the maximum multiplier by 0.8; a 3-point deduction would reduce the minimum multiplier by 0.6 and the maximum multiplier by 1.2; a 5-point deduction would reduce the minimum multiplier by 1.0 and the maximum multiplier by 2.0; and an 8-point deduction would reduce the minimum multiplier by 1.6 and the maximum multiplier by 3.2. *Id.* § 8C2.6.

[29] *Id.* § 8C2.5(g)(3) (subtracting 1 point from the culpability score for acceptance of responsibility); *id.* § 8C2.5(b) (adding between 1-5 points based on the size of the organization and the role within the organization of the responsible individuals).

[30] *Id.*

[31] *Id.* § 8C2.8.

[32] *See, e.g.*, Plea Agreement at 8, 13, United States v. Olympus Med. Sys. Corp., No. 2:18-cr-00727-SRC (D.N.J. Dec. 10, 2018), www.justice.gov/usao-nj/press-release/file/1118431/download [https://perma.cc/2G44-L7NV]. In December 2018, Olympus Medical Systems Corporation ("Olympus") entered into a criminal plea agreement with DOJ, pursuant to which Olympus agreed to pay a fine of $80 million (plus criminal forfeiture of $5 million). According to the Plea Agreement, the payment was based on a culpability score of 7—reflecting a 2-point deduction for cooperation pursuant to U.S.S.G. § 8C2.5(g)(2)—leading to a multiplier range of 1.4 to 2.8 and a Guidelines Fine Range of $46.2 to $92.4 million. If not for the cooperation credit, Olympus's culpability score would have been 9 and its multiplier range would have been 1.8 to 3.6, leading to a Guidelines Fine Range of $59.4 to $118.8 million and a fine of $103.4 million if the fine was similarly approximately 87% of the Maximum. If Olympus had not only cooperated but self-disclosed, its culpability score would have been 4 and its multiplier range would have been 0.8 to 1.6, leading to a Guidelines Fine range of $26.4 to $52.8 million and a fine of $45.9 million, if the fine was

The combined impact of the U.S. Sentencing Guidelines and DOJ policy is substantial transparency as to how DOJ calculates criminal fines and how compliant behaviors impact those calculations. One recent example, typical of the level of transparency in criminal resolutions, was DOJ's resolution of criminal FCPA charges against TechnipFMC plc through a Deferred Prosecution Agreement (DPA).[33] In the DPA, DOJ included the U.S. Sentencing Guidelines calculations in explaining how the fine was calculated, noting the base fine was $141,040,000, and the Culpability Score was ten, with the calculation laid out in the DPA.

> Culpability Score.[34] Based upon USSG § 8C2.5, the culpability score is 10, calculated as follows:
>
> | | | |
> |---|---|---|
> | (a) | Base Culpability Score | 5 |
> | (b)(1) | the organization had 5,000 or more employees and an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense | +5 |
> | (c)(2) | Prior History less than 5 years | +2 |
> | (g)(2) | Cooperation, Acceptance | -2 |
> | TOTAL | | 10 |

similarly approximately 87% of the Maximum. Thus, the act of cooperation presumably saved Olympus approximately $23 million, and Olympus could presumably have saved $57.5 million had it self-disclosed and cooperated. *Id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.5(g)(1)–(2), 8C2.6 (2018).

[33] Deferred Prosecution Agreement at 9, United States v. TechnipFMC plc, 19-cr-278 (E.D.N.Y 2019) [hereinafter TechnipFMC DPA], https://www.justice.gov/opa/press-release/file/1177316/download [https://perma.cc/WRH3-A9TT]; *see also* Press Release, U.S. Dep't of Just., TechnipFMC Plc. and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case (June 25, 2019), https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve [https://perma.cc/MPH9-YGWU] ("'Today's resolution takes aim at the scourge of bribery, but does so in a fair and evenhanded way,' said Assistant Attorney General [Brian A.] Benczkowski. 'It is a testament to the strength and effectiveness of international coordination in the fight against corruption, but also an acknowledgement that the Department is fully committed to reaching fair and just resolutions with companies that fully cooperate and remediate.'").

[34] TechnipFMC DPA, *supra* note 33, at 8.

Under the Sentencing Guidelines, it is explicit that the reduction of two points consisted of one point based on the company's acceptance of responsibility and an additional point based on the company's cooperation.[35]

DOJ went on to provide the fine range ($282,080,000–$564,160,000) based on the Culpability Score and stated in the agreement that, if not for the defendant's remedial measures and cooperation, DOJ would have viewed the appropriate fine as "a point near the midpoint of the applicable [ ] fine range" because the defendant was a recidivist.[36] DOJ provided details regarding the defendant's remedial measures and cooperation and made explicit that TechnipFMC "received full cooperation and remediation credit . . . [a] 25 percent reduction for cooperation and remediation," leading to an ultimate fine of $296,184,000.[37] The defendant—and others throughout industry and the defense bar—can see that DOJ reduced the fine by 25% (more than $98 million) based on TechnipFMC's cooperation and remediation.

II. THE FALSE CLAIMS ACT

A. The FCA Is the Government's Primary Health Care Fraud Enforcement Tool

While for some industries, criminal prosecutions are DOJ's primary enforcement mechanism, in the health care industry, that honor has long been held by civil cases brought under the False Claims Act.[38] In Fiscal Year 2019 alone, DOJ

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[35] U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.5(g)(2)–(3) (2018).

[36] TechnipFMC DPA, *supra* note 33, at 5.

[37] *Id.* at 3–5.

[38] *See, e.g.*, Lewis Morris & Gary W. Thompson, *Reflections on the Government's Stick and Carrot Approach to Fighting Health Care Fraud*, 51 ALA. L. REV. 319, 327–30 (1999) (referring to the FCA as "the [g]overnment's [p]rimary [w]eapon [a]gainst [f]raud" and pointing to the FCA's *qui tam* provision as a primary reason for its growth); Pamela H. Bucy, *Growing Pains: Using the False Claims Act to Combat Health Care Fraud*, 51 ALA. L. REV. 57, 59–60 (1999) (concluding that the FCA's *qui tam* provision, lower mens rea requirement, and lower burden of proof, combined with the fact that most health care providers have substantial assets, makes the FCA a "potent and appropriate weapon to use against fraudulent health care providers"); Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 247 (1999) (noting DOJ's increasing reliance on the FCA to prosecute health care offenses).

The U.S. Department of Health and Human Services ("HHS") Office of Inspector General ("OIG") maintains a separate authority to bring civil monetary penalty ("CMP") actions based on a wide range of program violations. *Civil Monetary Penalties and Affirmative Exclusions*, U.S. DEP'T OF HEATH & HUM. SERVS., https://oig.hhs.gov/fraud/enforcement/cmp/index.asp [https://perma.cc/DA4D-QT39] (last visited Aug. 19, 2020). However, the size of CMP actions and resulting publicity from those actions has paled in comparison to FCA recoveries. *See* Stephen Payne, John Partridge, Jonathan Phillips, Julie Rapoport Schenker, Claudia Kraft, Maya Nuland, Stevie Pearl, Susanna Schuemann, Margo

recovered $2.6 billion from settlements and judgments in FCA cases involving the health care industry, representing the tenth consecutive year that DOJ's civil health care fraud settlements and judgments have exceeded $2 billion.[39] Between 2010 and 2019, DOJ has recovered $25.3 billion from settlements and judgments in FCA cases involving the health care industry.[40] With eye-catching numbers year after year, FCA recoveries have been DOJ's primary method of targeting organizations for health care enforcement.

DOJ has noted that, particularly in the health care arena, FCA cases are a primary mechanism not only for punishing misconduct but also for deterring fraud. In the December 2018 press release announcing the Fiscal Year 2018 recoveries, DOJ noted, "the Department's vigorous pursuit of health care fraud prevents billions [] in losses by deterring those who might otherwise try to cheat the system for their own gain."[41]

B. Background and Structure of the FCA

Congress originally enacted the FCA during the Civil War in response to concerns regarding fraud against the government by contractors selling "sick mules, lame horses, sawdust instead of gunpowder, and rotted ships with fresh paint."[42] While the FCA remains an important tool for enforcement in government contracting, over the last thirty years, it has been primarily used to address health care fraud. In Fiscal Year 2019, for example, the $2.6 billion recovered by DOJ from FCA cases involving the health care industry was roughly 87% of the $3 billion recovered in total by DOJ from FCA cases.[43]

Uhrman & Madelyn La France, *2018 Year-End FDA and Health Care Compliance and Enforcement Update – Providers*, GIBSON DUNN 9–11 (Mar. 7, 2019), https://www.gibsondunn.com/wp-content/uploads/2019/03/2018-year-end-fda-health-care-compliance-enforcement-update-providers.pdf [https://perma.cc/CQ9C-JHKU] (showing 135 CMP recoveries for $71 million in 2018 compared with 813 total civil actions, including FCA suits, for $2.91 billion in fiscal year 2018).

[39] *See* Press Release, U.S. Dep't of Just., Justice Department Recovers Over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019 [https://perma.cc/WM26-VCV2].

[40] *Id.* (providing figures for 2019); U.S. DEP'T OF JUST., FRAUD STATISTICS – HEALTH AND HUMAN SERVICES (Sept. 30, 2018), https://www.justice.gov/civil/page/file/1080696/download [https://perma.cc/AV58-KP29] (providing figures for 2010–21, 2018).

[41] Press Release, U.S. Dep't of Just., Justice Department Recovers over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018 (Dec. 21, 2018), https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018 [https://perma.cc/B5VP-SKCW].

[42] *Id.* (quoting Assistant Attorney General Jody Hunt).

[43] *See* U.S. Dep't of Just., Justice Department Recovers 2018, *supra* note 41.

The FCA imposes penalties on anyone who "knowingly presents . . . a false or fraudulent claim for payment or approval" to the Federal Government.[44] A violation of the FCA "includes four elements: falsity, causation, knowledge, and materiality."[45] In the context of the FCA, to act "knowingly" means that a person "has actual knowledge[,]" "acts in deliberate ignorance of the truth or falsity of the information[,]" or "acts in reckless disregard of the truth or falsity of the information[,]" but does not require proof of intent to defraud.[46]

The FCA provides that a person who violates the FCA "is liable to the United States Government for a civil penalty of not less than [$11,665] and not more than [$23,331] . . . plus three times the amount of damages which the Government sustains because of the act [of the person violating the FCA]."[47] Damages (referred to as single damages) are generally the amount of money the United States paid as a result of the false claim.[48] Thus, recovering single damages can be seen as making the Government whole.[49]

The Supreme Court previously described treble damages (three times the amount of damages) as "essentially punitive in nature," but later clarified that "treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives."[50] Whether characterized as remedial or punitive, it is clear that the prospect of having to repay not only the amount wrongfully obtained but instead three times the amount wrongfully obtained plus penalties used by DOJ in an effort to deter wrongful conduct in the first place. The only limitation on recoveries in the FCA statute is the inclusion of a Reduced Damages provision, which is triggered by self-disclosure and full cooperation before initiation of any government investigation into the misconduct.[51] Where the Reduced Damages criteria are satisfied, the Government is entitled to recover only double damages.[52] The FCA's statutory language ("is liable") renders treble damages and penalties mandatory unless the Reduced Damages provision applied, and while courts have placed some

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[44] 31 U.S.C. § 3729(a)(1)(A).

[45] *See* United States ex rel. Petratos v. Genentech Inc., 855 F.3d 481, 487 (3d Cir. 2017) (citing Universal Health Servs., Inc. v. U.S ex rel. Escobar, 136 S.Ct. 1989, 1996 (2016); Wilkins v. United Health Grp., Inc, 659 F.3d 295, 304–05 (3d Cir. 2011)).

[46] 31 U.S.C. § 3729(b)(1)(A)–(B).

[47] 31 U.S.C. § 3729(a)(1)(G); 28 C.F.R. § 85.5 (2020) (providing updated inflation-adjusted figures for penalties after November 2, 2015).

[48] *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 551–52 (1943).

[49] As discussed below and recently recognized by DOJ, because of lost interest and other factors, a recovery actually must be beyond single damages to truly make the government whole.

[50] Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 784 (2000); Cook Cty. v. U.S. *ex rel.* Chandler, 538 U.S. 119, 130 (2003).

[51] *See* 31 U.S.C. § 3729(a)(2). As detailed below, DOJ's application of the FCA has rendered this provision essentially meaningless; however, the existence of the Reduced Damages provision indicates a clear intent by the statute's drafters to reward self-disclosures.

[52] *Id.* ("[T]he court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.").

constitutional limits on the number of available penalties, there is virtually no check on the Government's ability to recover, at least, treble damages.[53]

DOJ has long trumpeted its ability to obtain treble damages plus penalties. One 2018 DOJ press release announcing an FCA settlement went so far as to note that treble damages are the "typical[]" liability under the FCA.[54] But DOJ is not required to demand treble damages (or penalties) in resolving an FCA case. While industry and the defense bar have long believed that DOJ rarely seeks treble damages, notably, there is no guidance or transparency from DOJ as to what constitutes a standard settlement or what factors influence what DOJ will demand.[55] This is in stark contrast to the extensive and public disclosures by DOJ on its settlement policies in criminal cases.

The rise in FCA cases, particularly in the area of health care fraud, can be traced back to amendments to the FCA in 1986, which provided substantial incentives for whistleblowers (referred to as "relators") to file *qui tam* lawsuits on behalf of the government alleging false claims.[56] Relators can recover between fifteen and thirty percent of the proceeds of a resolution, depending on whether the government elects to take the case over from the relator (this is referred to as the government "intervening") or if the relator proceeds without government intervention, and also depending "on the extent to which the person [i.e., the relator] contributed to the prosecution."[57]

In Fiscal Year 2019, relators filed 633 such *qui tam* suits and $2.1 billion of the $3 billion recovered in Fiscal Year 2019 was attributable to *qui tams*.[58] The government paid out $265 million to relators.[59] Although only roughly one-quarter

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[53] *See, e.g.*, United States v. Mackby, 261 F.3d 821, 831 (9th Cir. 2001) (noting that the Eighth Amendment's prohibition against excessive fines and penalties may in some cases limit the application of treble damages and penalty awards); *see also* U.S. DEP'T OF JUST., JUSTICE MANUAL § 4-4.120 (2019), https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.120 [https://perma.cc/393X-BTH8] ("Courts may limit the imposition of statutory civil penalties as a violation of a defendant's constitutional rights, such as where the civil penalty violates the Excessive Fines Clause of the Eighth Amendment.").

[54] Press Release, U.S. Dep't of Just., Medical Equipment Company Agrees to Pay $5.25 Million (Oct. 22, 2018), https://www.justice.gov/usao-edky/pr/medical-equipment-company-agrees-pay-525-million-resolve-allegations-fraudulent-claims [https://perma.cc/UEP7-7EFM].

[55] *See, e.g.*, Brian C. Elmer & Alan W.H. Gourley, *FCA Settlements: A Practical Guide for Defense Counsel*, CROWELL & MORING LLP, https://www.crowell.com/documents/docassocfktype_presentations_440.pdf [https://perma.cc/52E2-F2PG] (last visited Aug. 17, 2020) ("In settling, DOJ does not insist on treble damages, although it will not acknowledge any specific policy to settle for less than treble damages. It does insist that, at a minimum, the government must be compensated for its entire loss, and it usually strives for at least double damages.").

[56] 31 U.S.C. § 3730.

[57] 31 U.S.C. § 3730(d).

[58] U.S. Dep't of Just., Justice Department Recovers 2018, s*upra* note 41.

[59] *Id.*

of filed *qui tams* are successful, they regularly account for a large majority of FCA actions and recoveries.[60]

In addition to bringing information to the government's attention and driving substantial recoveries, the mechanics of the FCA result in relators and their counsel effectively determining who within DOJ will work on a particular case. *Qui tams* are filed in one of the ninety-four federal districts and served upon both the U.S. Attorney's Office in that district and the U.S. Attorney General in Washington, D.C.[61] Health care FCA cases are generally handled either by an individual U.S. Attorney's Office working in conjunction with the Commercial Litigation Branch of DOJ's Civil Division or by an individual U.S. Attorney's Office without the involvement of DOJ's Civil Division. By controlling the decision of where to file an FCA suit, relators' counsel thus controls which U.S. Attorney's Office will be assigned to work on the case.

Although data is sparse and precise numbers are unknown, there is agreement that while hundreds of FCA cases are resolved each year, remarkably, few do so via trial.[62]

U.S. Attorney's Offices have the authority to settle claims where the gross amount of the original claim does not exceed $10 million.[63] DOJ's Civil Division—the Commercial Litigation Branch in the case of health care FCA cases—must approve settlements above those amounts unless DOJ's Civil Division delegates responsibility for the case to the individual U.S. Attorney's Office.[64]

C. Civil Resolution Guidance

As detailed above, there is a long and detailed history documenting DOJ's commitment to rewarding compliant corporate behavior in criminal resolutions. Until recently, however, there was virtually no formal guidance regarding how DOJ

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[60] BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY STOLTZFUS JOST, ROBERT L. SCHWARTZ, BRIETTA R. CLARK, ERIN C. FUSE BROWN, ROBERT GATTER, JAIME S. KING & ELIZABETH PENDO, HEALTH LAW: CASES, MATERIALS, AND PROBLEMS 994 (8th ed. 2018).

[61] *See* U.S. DEP'T OF JUST., JUSTICE MANUAL § 4-4.110 (2019), https://www.justice.gov/jm/jm-4-4000-commercial-litigation [https://perma.cc/3BD8-7QJ6].

[62] There is no available data tracking the number or percentage of FCA cases which end in trials, but there is widespread agreement that the number and percentage are low. *See* Joan H. Krause, *"Promises to Keep": Health Care Providers and the Civil False Claims Act*, 23 CARDOZO L. REV. 1363, 1413 (2002) (citing Leon Aussprung, *Fraud and Abuse: Federal Civil Health Care Litigation and Settlement*, 19 J. LEGAL MED. 1, 3 (1998) (describing the FCA cases which go to trial as a "small minority")); Jost & Davies, *supra* note 38, at 264 n.142 (noting lack of data and providing anecdotal evidence that few FCA cases are tried).

[63] U.S. DEP'T OF JUST., JUSTICE MANUAL, CIVIL RESOURCE MANUAL, CH. 46, REDELEGATION OF AUTHORITY TO COMPROMISE CIVIL CLAIMS (2016) [hereinafter DOJ CIVIL RESOURCE MANUAL], https://www.justice.gov/jm/civil-resource-manual-46-redelegation-authority-compromise-civil-claims [https://perma.cc/PVD5-FKGJ].

[64] *See id.*

would consider and reward compliant behaviors in resolving civil cases.[65] The U.S. Sentencing Guidelines are, of course, inapplicable to civil cases, leaving DOJ unconstrained in electing what policy to apply and how to calculate appropriate resolutions, beyond the Reduced Damages provision of the False Claims Act.[66]

Before the issuance of the Yates Memo, there was substantial skepticism within the industry and the defense bar as to whether DOJ had a policy of rewarding compliant behaviors in civil cases at all. It was thus notable that the Yates Memo, which focused heavily on the link between criminal and civil investigations, explicitly instructed civil prosecutors to take corporate cooperation into account.[67] None of the pre-Yates Memo iterations or discussions of the Corporate Prosecution Principles mentioned the impact of the Corporate Prosecution Principles on civil cases handled by DOJ or required DOJ's civil prosecutors to take the factors into account.[68]

Still, while the Yates Memo made clear that civil prosecutors were required to reward cooperation, the memo and its aftermath offered virtually no guidance as to *how* cooperation was to be taken into account—a reality certainly noticed by

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[65] Corporate Prosecution Principles, *supra* note 4, §§ 9-28.700–9-28.1000 (establishing compliant behavior factors starting in 2015). Within DOJ, the Civil Division and Criminal Division have separate leadership and reporting structures, with oversight for both Civil and Criminal non-existent until the level of Deputy Attorney General—just one level below the Attorney General. *See* U.S. DEP'T OF JUST., ORGANIZATION CHART (Feb. 5, 2018), https://www.justice.gov/agencies/chart [https://perma.cc/6W85-RYY6].

In most U.S. Attorney's Offices, oversight for both Civil and Criminal generally does not occur until the level of the U.S. Attorney or the U.S. Attorney's Executive Office. At least one U.S. Attorney's Office, the District of New Jersey, has combined oversight for both Civil and Criminal Health Care matters under the leadership of one Unit Chief, but that structure is the exception rather than the rule. *See, e.g.,* Press Release, U.S. Dep't of Justice, Medical Device Company Will Pay $646 Million for Making Illegal Payments to Doctors and Hospitals in United States and Latin America (Mar. 1, 2016), https://www.justice.gov/opa/pr/medical-equipment-company-will-pay-646-million-making-illegal-payments-doctors-and-hospitals [https://perma.cc/HUQ5-86N3].

DOJ encourages parallel proceedings, and the Yates Memo specifically encourages criminal and civil prosecutors to be in regular communication. U.S. DEP'T OF JUST., JUSTICE MANUAL, ORGANIZATION AND FUNCTIONS MANUAL, CH. 27, COORDINATION OF PARALLEL CRIMINAL, CIVIL, REGULATORY, AND ADMINISTRATIVE PROCEEDINGS (2012), https://www.justice.gov/jm/organization-and-functions-manual-27-parallel-proceedings [https://perma.cc/3HX6-26D5]; Yates Memo, *supra* note 10. Consistent with the Corporate Prosecution Principles, there is no clear guidance as to when a case should be treated as a civil case, a criminal case, or both. U.S. DEP'T OF JUST., JUSTICE MANUAL §9-28.000 (2015), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/6RVG-EMED].

[66] *See* 31 U.S.C. § 3729(a)(2).

[67] Yates Memo, *supra* note 10.

[68] *See* Filip Memo, *supra* note 5; Holder Memo, *supra* note 9; Thompson Memo, *supra* note 10; McNulty Memo, *supra* note 10; Yates Memo, *supra* note 10.

industry and the defense bar.[69] Both in relation to the Yates Memo and since, DOJ made statements in support of a compliant behavior discount in FCA cases, at least as it pertains to cooperation. In particular, following the publication of the Yates Memo in 2015, the Justice Manual chapter on civil cases was updated to include a reference to the requirements for business organization cooperation to earn credit in civil cases.[70] The reference, however, provided only one example—that "the Department's position on 'full cooperation' under the False Claims Act, 31 U.S.C. § 3729(a)(2), is that, at minimum, all relevant facts about responsible individuals must be voluntarily provided. . ." referring to an entity's ability to take advantage of the statutory provision limiting FCA damages to double actual damages in the context of a voluntary self-disclosure.[71]

In a series of public statements in 2018 and early 2019, DOJ affirmed that the corporate benefits in FCA cases for engaging in compliant behaviors go beyond the self-disclosure provision of the FCA. In June 2018, Acting Associate Attorney General Jesse Panuccio delivered a speech affirming DOJ's commitment to reward corporate defendants for "invest[ing] in strong compliance measures" and for "genuine cooperation," noting that "the extent of the discount will depend on the nature of the cooperation and how helpful it is to the Department's investigation, including our pursuit of individual wrongdoers."[72] Then in January 2019, Deputy Associate Attorney General Stephen Cox delivered a speech at an FCA conference in which he assured the audience that "the Department is committed to rewarding companies that invest in strong compliance programs and who cooperate with our investigations into wrongdoing."[73]

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[69] Gejaa Gobena, Mitch Lazris, Peter S. Spivack & Karla Aghedo, *DOJ Embraces a More Realistic Position on Corporate Cooperation*, 33 No. 05 WESTLAW J. WHITE-COLLAR CRIME 3, WL 124214 (2019) (noting that "the impact of cooperation on the calculation of civil FCA settlement amounts remains a mystery" in an article by Hogan Lovells US LLP attorneys, three of whom previously worked for DOJ); Laura McLane & Rebecca C. Martin, *Cooperation in the Eye of the Beholder: DOJ Official Bill Baer Elaborates on Cooperation in False Claims Act and Other Civil Enforcement Matters*, MCDERMOTT WILL & EMERY (Oct. 18, 2016), https://www.mwe.com/insights/doj-elaborates-on-cooperation-in-fca/ [https://perma.cc/69DH-9NX8]. This article by McDermott, Will & Emery attorneys, one of whom previously worked for DOJ, notes that "critically, defendants continue to be in the dark about what benefits cooperation genuinely confers" when faced with prosecution. *Id.*

[70] U.S. DEP'T OF JUST., JUSTICE MANUAL § 4-3.100(3) (2018), https://www.justice.gov/jm/jm-4-3000-compromising-and-closing#4-3.100 [https://perma.cc/NQ5Q-E5ZN].

[71] *Id.*

[72] Jesse Panuccio, Acting Assoc. Att'y Gen., U.S. Dep't of Just., Address at the American Bar Association's 12th National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 14, 2018), *in* JUST. NEWS (June 14, 2018), https://www.justice.gov/opa/speech/acting-associate-attorney-general-jesse-panuccio-delivers-remarks-american-bar [https://perma.cc/G4L5-J8L9].

[73] Stephen Cox, Deputy Assoc. Att'y Gen., U.S. Dep't of Just., Address at the 2019 Advanced Forum on False Claims and Qui Tam Enforcement (Jan. 28, 2019), *in* JUST. NEWS, (Jan. 28, 2019), https://www.justice.gov/opa/speech/deputy-associate-attorney-general-

Finally, in May 2019, through a statement from Assistant Attorney General Jody Hunt and accompanying changes to the Justice Manual, DOJ issued for the first time, formal guidance regarding rewards for compliant behavior in FCA cases.[74, 75]

While DOJ has not said so explicitly, indications are that the "Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters" are intended to represent transparency regarding already existing policy rather than a change in policy, and commentators have described it as simply "providing more insight into the Justice Department's process."[76] The announcement accompanying the FCA Guidance referred to the FCA Guidance as "formal guidance," stating that the FCA Guidance "explain[s] the manner in which the Department of Justice awards credit to defendants who cooperate with the Department during a False Claims Act investigation," and noting that "[t]he formal policy . . . identifies the type of cooperation eligible for credit"—language consistent with clarification and transparency regarding an already existing policy.[77] And while Principal Deputy Associate Attorney General Claire McCusker Murray gave a speech two weeks after the release of the FCA Guidance in which she twice referred to the FCA Guidance as a "new policy" and also referred to the FCA Guidance as a "False Claims Act reform," in the same speech she provided two examples of the policy in action—resolutions announced six months and two months, respectively, prior to the issuance of the FCA Guidance.[78]

The FCA Guidance "identif[ies] factors that will be considered and credit that will be provided" based on compliant behaviors.[79] For self-disclosure, cooperation, and remediation, the FCA Guidance provides examples of conduct that would constitute voluntary disclosure, cooperation, and remediation.[80]

The substance of the FCA Guidance with regard to compliant behaviors largely mirrors the Corporate Prosecution Guidelines. Two exceptions, however, are worth noting. First, the FCA Guidance includes "[a]dmitting liability or accepting

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stephen-cox-delivers-remarks-2019-advanced-forum-false [https://perma.cc/4H6J-SAKY].

[74] Press Release, U.S. Dep't of Just., Issues Guidance on False Claims Act Matters and Updates, Justice Manual (May 7, 2019) [hereinafter FCA Guidance], https://www.justice.gov/opa/pr/department-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual. [https://perma.cc/QGR2-7F9V].

[75] U.S. DEP'T OF JUST., JUSTICE MANUAL § 4-4.112 (2019) https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.112. [https://perma.cc/59SR-YUGY].

[76] Jacob Rund, *Justice's False Claims Guide Meant to Spur Cooperation*, BL (May 9, 2019, 4:30 AM), https://news.bloomberglaw.com/corporate-governance/justices-false-claims-guide-meant-to-spur-cooperation?context=search&index=0 [https://perma.cc/F2KU-PBEF].

[77] FCA Guidance, s*upra* note 74.

[78] Claire McCusker Murray, Principal Deputy Assoc. Att'y Gen., U.S. Dep't of Just., Remarks at the Compliance Week Annual Conference (May 20, 2019), *in* JUST. NEWS at 3–6 (May 20, 2019) https://www.justice.gov/opa/speech/remarks-principal-deputy-associate-attorney-general-claire-mccusker-murray-compliance [https://perma.cc/PW5B-EC7L].

[79] FCA Guidance, s*upra* note 74.

[80] *Id.*

responsibility for the wrongdoing or relevant conduct," among the "Forms of Cooperation."[81] This is unlike in the criminal context, where acceptance of responsibility is a prerequisite for cooperation credit rather than an example of cooperation, both under DOJ criminal policy and the U.S. Sentencing Guidelines (where acceptance of responsibility without cooperation is separately rewarded).[82] In addition, as detailed in Sections III.C. and F., below, it appears that DOJ has been rewarding defendants for their willingness to settle FCA cases, regardless of whether they are accepting responsibility by making admissions or otherwise acknowledging wrongdoing.

Second, for the existence of a pre-existing compliance program, the FCA Guidance does not state that it will lead to a reduction in the multiplier and instead notes "the Department may take into account the prior existence of a compliance program in evaluating a defendant's liability under the False Claims Act. For example, the Department may consider the nature and effectiveness of such a compliance program in evaluating whether any violation of law was committed knowingly."[83] It is unclear whether this statement is simply DOJ noting the relevance of a pre-existing compliance program for a legal determination of whether the conduct was committed "knowingly"—an element under the FCA—or is meant to imply a benefit is available to defendants whose conduct is deemed to meet the elements of the FCA despite having a meaningful pre-existing compliance program.[84] If solely the former, this would seemingly represent an unintentional departure from long-standing DOJ policy (also found in the U.S. Sentencing Guidelines) rewarding pre-existing compliance programs—policy which DOJ has reiterated in strong terms as recently as November 2019: "The corporate compliance function is in some ways more important than the prosecution function. It can actually prevent misconduct in the first place through robust systems of controls, and by fostering a culture where compliance is valued and rewarded."[85]

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[81] *Id.*

[82] U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.5(g)(2)–(3) (2018).

[83] U.S. DEP'T OF JUST., JUSTICE MANUAL, *supra* note 53, § 4-4.112.

[84] 31 U.S.C. § 3729(a)(1).

[85] Brian A. Benczkowski, Assistant Att'y Gen., U.S. Dep't of Just., Remarks at the 20th Annual Pharmaceutical and Medical Device Compliance Congress (Nov. 6, 2019), *in* JUST. NEWS (Nov. 6, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-20th-annual-pharmaceutical [https://perma.cc/R9RY-BQHP].

It would not, however, be the first time in recent memory DOJ has seemed to stray from emphasizing the importance of pre-existing compliance programs. *See* Andrew Spalding, *Restoring Pre-Existing Compliance Through the FCPA Pilot Program*, 48 U. TOL. L. REV. 519, 520–21 (2017) (lamenting DOJ's neglecting to incentivize investments in pre-existing compliance under the FCPA Pilot Program). The lack of attention to pre-existing compliance noted by Spalding with regard to the FCPA Pilot Program was not addressed when the Pilot Program was formalized into the Corporate Enforcement Policy in November 2017. *See* U.S. DEP'T OF JUST., JUSTICE MANUAL, *supra* note 20, § 9-47.120.

The FCA Guidance states that credit for compliant behaviors will "[m]ost often . . . be exercised by reducing the penalties or damages multiple sought by the Department."[86] A clear parallel exists between a reduction of the FCA multiplier and a reduction of the criminal fine multiplier. In certain respects, the FCA Guidance is thus in line with the criminal-side trend towards increased transparency in rewarding compliant behaviors. The Principal Deputy Associate Attorney General acknowledged as much in her May 2019 speech when she referred to the FCA Guidance as "tak[ing] a page from the Corporate Enforcement Policy."[87] That is true in so far as the FCA Guidance offers clarity as to how compliant behavior will be judged and as to what compliant behavior will be rewarded. But the Corporate Enforcement Policy in the criminal context applies benefits for engaging in compliant behaviors, which are specifically articulated ahead of time and explicitly identified at the time of resolution, while the FCA Guidance applicable in the civil context neither provides the former nor promises the latter.

Even with the FCA Guidance, and unlike the U.S. Sentencing Guidelines and the Corporate Enforcement Policy, no DOJ guidance provides information as to how multipliers are calculated in the absence of compliant behaviors, nor offers any specifics as to what amount or percentage a resolution will be reduced based on compliant behaviors. Without specific information, industry and the defense bar have thus still been left with attempting to use individual resolutions to glean what form compliant behavior "credit" would take, an impossible task given that individual cases are, by their nature, highly fact-specific.

III. ANALYSIS OF CIVIL SETTLEMENT AGREEMENTS

A. The Multiplier & the Tax Cuts & Jobs Act

Though substantial attention has been paid to FCA cases, lack of DOJ transparency has resulted in a complete absence of empirical analysis regarding how DOJ wields the tremendous power provided to it under the FCA. Until 2018, it was virtually impossible to analyze FCA settlements and come away with any understanding of what impact the government's view of the defendant's compliance program or level of cooperation (or anything else) had on the government's calculations. In reaching and announcing FCA settlements, DOJ historically did not disclose the amount of "single damages" or the multiplier used to arrive at the ultimate resolution. Even the defendant could be left in the dark, as FCA settlements did not necessarily involve a meeting of the minds between the government and the defendant as to the method of calculation.

For example, when the Department of Justice reached the largest health care fraud settlement in U.S. history—a parallel criminal-civil resolution with GlaxoSmithKline LLC (GSK) in 2012 requiring GSK to pay $3 billion, the criminal plea agreement included detailed calculations showing how DOJ arrived at the $1

[86] U.S. DEP'T OF JUST., JUSTICE MANUAL § 4-4.120, *supra* note 53.
[87] McCusker Murray, *supra* note 78.

billion figure GSK paid as fine and forfeiture pursuant to the criminal plea, while the three separate Civil Settlement Agreements (CSAs) totaling $2 billion in payments under the FCA provided no information about whether that figure represented single damages, treble damages plus penalties, or somewhere in between.[88] As significantly, like the TechnipFMC DPA described above,[89] the GSK criminal plea agreement identified the specific deduction made based on GSK's cooperation in the government's investigation and acceptance of responsibility, and the criminal plea agreement was clear that GSK did not receive a deduction for self-disclosure or for having an effective pre-existing compliance program.[90] None of the three GSK CSAs provided any information about what role GSK's compliant behaviors, or lack of compliant behaviors, played in DOJ's arrival at the $2 billion civil figure.[91] Just as the GSK criminal plea agreement's transparency was typical of criminal DOJ resolutions, the complete lack of transparency in the GSK CSAs was typical of civil DOJ resolutions.[92]

That changed, however, with the 2017 passage of the Tax Cuts and Jobs Act.[93] Section 13306 of the Act made clear that business organizations can deduct only

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[88] *Compare* Plea Agreement at 3–6, United States v. GlaxoSmithKline LLC, No. 1:12-cr-10206 (D. Mass. July 02, 2012) [hereinafter Plea Agreement, GlaxoSmithKline], https://www.justice.gov/sites/default/files/opa/legacy/2012/07/02/plea-agreement.pdf [https://perma.cc/PH5H-RYYC], *with* Avandia Civil Settlement Agreement at 6–7, United States v. GlaxoSmithKline LLC, No. 1:12-cr-10206 (D. Mass. 2012), https://www.justice.gov/sites/default/files/opa/legacy/2012/07/02/avandia-agreement.pdf [https://perma.cc/Q5A5-K5ZQ], Nominals Civil Settlement Agreement at 8–9, United States v. GlaxoSmithKline LLC, No. 1:12-cr-10206 (D. Mass. June 27, 2012), https://www.justice.gov/sites/default/files/opa/legacy/2012/07/02/nominals-agreement.pdf [https://perma.cc/PH5H-RYYC], *and* Off Label Civil Settlement Agreement at 6–8, United States v. GlaxoSmithKline LLC, No. 1:12-cr-10206 (D. Mass. 2012), https://www.justice.gov/sites/default/files/opa/legacy/2012/07/02/off-label-agreement.pdf [https://perma.cc/E2C2-6BNB].

[89] *See supra* Section I.C.

[90] *See* Plea Agreement, GlaxoSmithKline, *supra* note 88, at 3–4.

[91] *See* Avandia Civil Settlement Agreement, *supra* note 88, at 6; Civil Settlement Nominals Agreement at 8–9, United States v. GlaxoSmithKline LLC No. 1:12-cr-10206 (D. Mass. July 2, 2012), https://www.justice.gov/sites/default/files/opa/legacy/2012/07/02/nominals-agreement.pdf [https://perma.cc/2W6L-MNLN]; Off Label Civil Settlement Agreement at 6, United States v. GlaxoSmithKline LLC No. 1:12-cr-10206 (D. Mass. July 2, 2012), https://www.justice.gov/sites/default/files/opa/legacy/2012/07/02/off-label-agreement.pdf [https://perma.cc/E2C2-6BNB].

[92] I have not found any CSAs prior to early 2018 which included any information about how DOJ calculated the settlement figure.

[93] Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017). The Tax Cuts and Jobs Act was the most sweeping reform of the Tax Code since the Tax Reform Act of 1986. William G. Gale, Hilary Gelfond, Aaron Krupkin, Mark J. Mazur, & Eric Toder, *Effects of the Tax Cuts and Jobs Act: A Preliminary Analysis*, TAX POLICY CTR. 1 (June 13, 2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_20180608_tcja_summary_paper_final.pdf [https://perma.cc/7XC9-HS88]. While much attention has been paid to the Tax Cuts and Jobs Act's impact on individual and corporate tax liability, and its setting

those portions of settlements paid to the government that they can establish were paid as restitution or expended to come into compliance with the law.[94] (A defendant settling for single damages can thus deduct the entire cost of the settlement, while a defendant settling for treble damages can only deduct one-third.) Significantly, the statute requires that the money must be specifically identified as such in a court order or settlement agreement and imposes on the government an obligation to provide notice to the Internal Revenue Service and the settling party of the restitution amount contained within civil settlements.[95] In response, DOJ has regularly been including the "restitution" figure in FCA CSAs since early 2018, from which the multiplier used in each particular case can be calculated.[96] With that, for the first time, systematic analysis of DOJ resolutions is possible.

The analysis which follows attempts to fill in this gap by examining resolutions along with multiple different factors.

B. Methodology

I have attempted to review the CSAs from all civil-only FCA settlements entered into between health care business organizations and DOJ between early 2018 and May 31, 2019, as well as the accompanying DOJ press releases and other public statements made by DOJ or the settling defendants.[97] Where possible, I have tracked: the dollar amount of the resolution; the amount of the resolution which constituted restitution under the CSA; whether the case stemmed from the filing of a *qui tam*; the U.S. Attorney's Office involved in the case; whether DOJ's Commercial Litigation Branch was involved in the case; whether there were indicia of acceptance of responsibility; and whether there were indicia of compliant behaviors. Some CSAs were not available. Several available CSAs did not reference a restitution figure or contained arrangements which made determination of the intended multiplier impossible, and, unfortunately, there is no mechanism to determine whether there have been any CSAs that my analysis did not identify. My

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at zero dollars, the amount of the shared responsibility payment imposed as a penalty on those who failed to ensure that they had minimum essential coverage to satisfy the Patient Protection and Affordable Care Act's individual mandate, there has been little focus on the Section most relevant to this Article.

[94] § 13306, 131 Stat. at 2126–28.

[95] *Id.* at 2127.

[96] *See, e.g.*, Civil Settlement Agreement at 4, United States v. Dermatology Assocs. of Cent. N.Y., No. 5:15-cv-00315-TJM-ATB (N.D.N.Y. Nov. 30, 2018), https://www.justice.gov/usao-ndny/press-release/file/1117066/download [https://perma.cc/ZZY5-XZT3].

[97] The four identified FCA resolutions with criminal components were excluded from the analysis, as it would be impossible with current information to account for the impact of the monetary components of the criminal resolution (fine and forfeiture) on the civil resolution. For example, it is impossible to know whether an FCA amount was reduced because of the monetary components of the criminal resolution. Regardless, given the small number, including those resolutions would not have had a notable impact on the analysis.

analysis includes 118 CSAs, including 89 CSAs for which the restitution and thus the multiplier could be determined.[98]

C. Average Multiplier

Despite DOJ's statements regarding the potential for treble damages plus penalties under the False Claims Act, for the 89 CSAs for which the multiplier could be determined, the mean multiplier was 1.78, and the median multiplier was 2.0. Of those eighty-nine CSAs, seventy-eight (88%) were at or below double damages—forty-four were at double damages, and thirty-four were between 1.0-1.9, seemingly confirming widespread sentiment amongst industry and the defense bar that settlement multipliers are rarely above double damages.[99]

Table 1: Multipliers

Multiplier	**# of CSAs**
> 2.0	11
2.0	44
< 2.0	34

There were only eleven CSAs above 2.0, and neither the CSAs nor the DOJ press releases explained why they had a higher than default multiplier. If those eleven organizations engaged in conduct DOJ wishes to disincentivize, the lack of transparency prevents any such general deterrence from taking place.

Notably, this distribution renders the FCA's Reduced Damages provision, 31 U.S.C. § 3729(a)(2), largely meaningless, and it is not surprising that none of the CSAs referenced the provision.[100] With settlement details now public, business organizations know that they do not generally need to self-report, or even cooperate

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[98] A table summarizing the data is included at Appendix 1.

[99] Multipliers were rounded to the nearest tenth for purposes of categorization. Thus, any multiplier below 2.05 but greater than or equal to 1.95 was considered 2.0 for purposes of categorization.

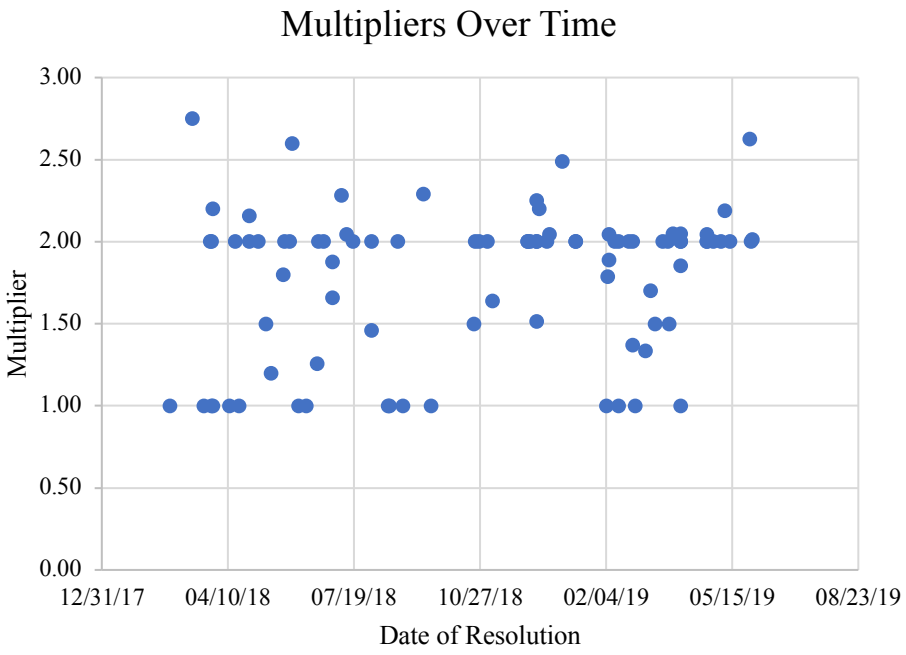
Some may question whether DOJ is accurately reporting restitution figures, or whether DOJ and defendants may in some cases be agreeing on a resolution figure and then engaging in additional negotiation regarding the percentage attributable to restitution. By its definition, "restitution" should not be impacted by litigation risk, compliant behaviors, or other factors. Even if one questions the integrity of the restitution figures, however, given that the signaling impact of FCA multipliers are geared towards general deterrence rather than specific deterrence, and because there is no reason to suspect such negotiations would be more prevalent in certain categories of cases than in others, any such horse trading would not impact the analysis or its conclusions.

[100] As explained in section II.B., *supra*, the FCA's Reduced Damages provision eliminates penalties, and caps the Government's recovery at double-damages, in the case of self-disclosure and full cooperation. *See* 31 U.S.C. § 3729(a)(2). There is little benefit to a statutory entitlement to a double-damages settlement in exchange for self-disclosure when virtually all cases are settled at or below double-damages.

or accept responsibility, to obtain a settlement at or below double-damages. This necessarily eliminates the provision's intended incentive.

Given that the FCA Guidance was released during the time period of my analyses and followed after months of DOJ discussion regarding the guidance announcement, I also examined whether there was a change in the multipliers over time. As can be seen visually in Chart 1, there are no indicia that multipliers changed during this time.

Chart 1: Multipliers over Time



Because the execution and announcement of CSAs generally occur months after an agreement in principle to the key terms, including the dollar amount and the restitution amount, and CSAs did not consistently identify when such agreements in principle were reached, it is impossible to separate pre-FCA Guidance CSAs from post-FCA Guidance CSAs in a way that assures accuracy. It will be useful to repeat this analysis in the future.

Also notable amongst the data is the fact that sixteen defendant entities (18%) received multipliers of 1.0. DOJ acknowledged in the FCA Guidance that a resolution with a multiplier of 1.0 does not even make DOJ whole or leave the defendant without the benefit of the wrongdoing.[101] The FCA Guidance notes that even where defendants are receiving benefits for compliant behaviors, the benefits

[101] *See* FCA Guidance, *supra* note 74.

cannot be so much as to prevent the government from recovering a multiplier sufficiently above 1.0 to cover the lost interest, cost of investigation, and relator's share (in the case of a *qui tam*).

Several of the DOJ press releases accompanying those sixteen 1.0 multiplier resolutions included government statements about defendants engaged in wrongdoing being "held accountable,"[102] that the resolution sent a "message [that] . . . [f]raudulently billing for services is bad business,"[103] or other, similar language. Virtually all involved conduct from several years prior, and therefore a multiplier substantially above 1.0 would have been required simply to cover interest. These defendants' resolutions effectively require them to repay what amounts to a no-interest loan to the government, in at least one case, having kept some or all of the ill-gotten gains for more than a decade.[104] And in terms of the government receiving "full compensation" as called for under the FCA Guidance,[105] in addition to failing to recover lost interest or costs of investigation, nine of the sixteen were the result of *qui tams*, meaning the government paid at least 15% of those recoveries to a relator.[106]

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[102] Press Release, U.S. Dep't of Just., Pentec Health, Inc. to Pay $17 Million to Settle False Claims Act Allegations (Feb. 4, 2019), *in* JUST. NEWS (Feb. 4, 2019), https://www.justice.gov/usao-edpa/pr/pentec-health-inc-pay-17-million-settle-false-claims-act-allegations [https://perma.cc/N5A5-5XEA]; *see also* Press Release, U.S. Dep't of Just., Signature HealthCARE to Pay More than $30 Million to Resolve False Claims Act Allegations Related to Rehabilitation Therapy (June 8, 2018), *in* JUST. NEWS (June 8, 2018), https://www.justice.gov/opa/pr/signature-healthcare-pay-more-30-million-resolve-false-claims-act-allegations-related [https://perma.cc/83RT-VVH4] ("When we determine that companies are cheating the taxpayers, we will hold them accountable as we have in this case.").

[103] Press Release, U.S. Dep't of Just., Ambulance Company to Pay $9 Million to Settle False Claims Act Allegations (Mar. 28, 2018), *in* JUST. NEWS (Mar. 28, 2018), https://www.justice.gov/opa/pr/ambulance-company-pay-9-million-settle-false-claims-act-allegations [https://perma.cc/AV5G-84QL].

[104] *See, e.g.*, U.S. Dep't of Just., Pentec Health, Inc. to Pay $17 Million, *supra* note 102 (describing the time period of the misconduct as "2007 to 2018").

[105] *See* FCA Guidance, *supra* note 74.

[106] While some of these 16 cases may have had limited recoveries due to defendants' ability to pay, DOJ declined in these cases to require judgments and contingency payments over time to raise the multiplier in order to achieve even the possibility of the government being made whole and the defendants fully disgorging their benefits from the misconduct. *See* FCA Guidance, *supra* note 74.

CSAs contain identifying language when a defendants' lack of financial resources have impacted the resolution. *See* 24 C.J.S. *Criminal Procedure and Rights of Accused* § 2488 (2020), However, such language does not identify whether the impact took the form of a reduced multiplier, or instead took other forms, including allowing payments over time. Given DOJ's ability to use additional tools—payments over time, judgments, contingency payments—to achieve whatever multiplier is deemed appropriate, ability to pay cannot be a plausible or satisfying explanation for the low multipliers found in numerous CSAs.

D. Significant Impact Based on Involvement of the Commercial Litigation Branch

I also examined the government entity handling the resolution. Of the civil-only resolutions I identified, seventy-four (63%) were handled by individual U.S. Attorney's Offices without the involvement of the Commercial Litigation Branch in Washington. In comparison, forty-four (37%) involved the Commercial Litigation Branch in addition to a U.S. Attorney's Office. I then ran a two-sample t-test to analyze the difference in means for the fifty-three (60%) resolutions handled by individual U.S. Attorney's Offices without the involvement of the Commercial Litigation Branch for which I could identify the multiplier and the thirty-six (40%) resolutions which involved the Commercial Litigation Branch in addition to a U.S. Attorney's Office for which I could identify the multiplier.

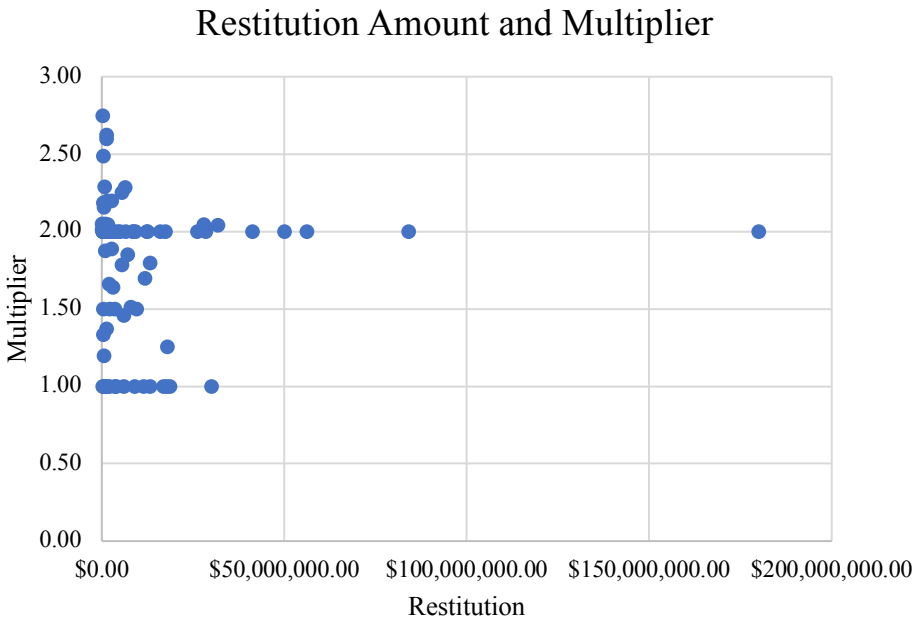
The mean multiplier for cases without the involvement of the Commercial Litigation Branch ($M = 1.86$, $SD = 0.429$) was significantly higher (at 5% level) than the mean multiplier for cases with the involvement of the Commercial Litigation Branch ($M = 1.66$, $SD = 0.458$), $t(87) = 2.107$, $p = 0.037$.[107]

In considering possible explanations for this significant difference in means, I examined whether the size of the resolutions might explain it. As noted above, DOJ's Civil Division must approve all large settlements unless the case is delegated to an individual U.S. Attorney's Office to handle.[108] As a result, the mean resolution for cases without the involvement of the Commercial Litigation Branch was $7,404,954, while the mean resolution for cases involving the Commercial Litigation Branch in addition to a U.S. Attorney's Office was $34,857,974. Given this, I calculated the correlation between the multiplier and the amount of the restitution and found the correlation coefficient to be 0.0347—a very weak uphill (positive) linear relationship. The difference in resolution size thus does not explain the difference in means.

[107] *See infra* Appendix 2.

[108] *See* DOJ CIVIL RESOURCE MANUAL, *supra* note 63.

Chart 2: Restitution Dollar Amount and Multiplier



Of the eleven CSAs above 2.0, referenced in Section III.B., above, the Commercial Litigation Branch participated in only one of them—the rest were handled by individual U.S. Attorney's Offices without the participation of the Commercial Litigation Branch. Interestingly, five of the eleven were from one U.S. Attorney's Office (which also had three CSAs at 2.0 and one CSA below 2.0 when resolving cases without the involvement of the Commercial Litigation Branch, and one CSA at 2.0 resolved with the involvement of the Commercial Litigation Branch). Given the small sample size relating to each U.S. Attorney's Office and the lack of case-specific information, it is fair to ask but impossible to conclude definitively that there is a lack of consistency among individual U.S. Attorney's Offices in determining FCA multipliers. Without greater transparency, however, such outliers will inevitably lead to speculation that certain prosecuting offices are requiring higher multipliers than others.

There is reason, both in terms of structure and of incentives, to be concerned that different U.S. Attorney's Offices may have different views as to how resolutions should be calculated. Structurally, there is simply no DOJ guidance—neither public nor internal—to guide U.S. Attorney's Offices in calculating FCA multipliers. DOJ officials have made statements trumpeting the potential exposure for defendants under the statute. Still, they have provided no guidance to the field as to how they should determine numbers below the maximum.

This is particularly important because the 118 cases involved forty-six different U.S. Attorney's Offices, and twenty-four different U.S. Attorney's Offices resolved

fifty-three cases without the involvement of the Commercial Litigation Branch. And while inconsistency is of concern even were it limited to smaller resolutions, it is notable that many of the U.S. Attorney's Office-only resolutions were larger than might be expected given the delegation rules.[109] The mean U.S. Attorney's Office-only resolution was $7.4 million, and there were seven U.S. Attorney's Office-only resolutions above $10 million.

Various potential explanations exist for this aspect of the data analysis. One possibility, explained and examined in further detail in Section III.E., below, is that U.S. Attorney's Offices might be treating defendants more harshly because of a desire to improve their standing with the *qui tam* bar as they compete with other U.S. Attorney's Offices for future cases. (Such efforts would not necessarily be limited to the handling of *qui tam* cases.[110]) The difference might also be explained by the fact that the Commercial Litigation Branch simply has a different view than some U.S. Attorney's Offices as to the appropriate method of multiplier calculation, or by the fact that the Commercial Litigation Branch handles many more cases, leading U.S. Attorney's Offices to lack context and potentially view the conduct of their defendants more harshly.[111] As available data continues to grow, further analysis may provide answers to these questions.

E. Questionable Impact Based on Existence of Qui Tams—Data Bears Watching

The structure of the *qui tam* system incentivizes individual U.S. Attorney's Offices to compete for the attention of relators' counsel, who are frequently repeat players, largely control the distribution of cases among U.S. Attorney's Offices by deciding where to file their cases, and file their cases where the resolution is likely to be highest (as relators' share is a percentage of the government's recovery).[112] As

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[109] *Id.*

[110] Members of the *qui tam* bar likely do not look only to resolutions stemming from *qui tams* when evaluating which U.S. Attorney's Offices generate the largest settlements. Cases generated from *qui tams* may take on increased significance, however, because of statements made by the involved *qui tam* attorneys about whether the government maximized the potential recovery. A substantial number of *qui tam* attorneys are members of Taxpayers Against Fraud Education Fund, and participate in a listserv where they share information regarding, among other things, their experiences with individual U.S. Attorney's Offices. *Taxpayers Against Fraud Education Fund Membership*, TAXPAYERS AGAINST FRAUD EDUC. FUND, https:///member.taf.org/become-a-member [https://perma.cc/2SA3-K24S] (last visited Aug. 19, 2020).

[111] *See* Adi Leibovitch, *Punishing on a Curve*, 111 NW. U. L. REV. 1205, 1205 (2017) (analyzing judicial decision making as to sentencing and arguing that judges sentence given offenses "more harshly when their caseloads contain relatively milder offenses and more leniently when their caseloads contain more serious crimes.").

[112] *See* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from* Qui Tam *Litigation*, 112 COLUM. L. REV. 1244, 1249 (2012) (analyzing *qui tam* filings and noting superior litigation outcomes in the large number of *qui tams* filed by repeat players); 31 U.S.C. § 3730(b)(2).

a result, there is reason to be concerned that the *qui tam* system is impacting the behavior of U.S. Attorney's Offices in resolving FCA matters. The system may create pressure for individual U.S. Attorney's Offices to be tougher on defendants to impress potential relators' counsel. Individual U.S. Attorney's Offices may be susceptible to pressure from relators' counsel in individual cases to use a higher multiplier (whether by taking a higher position as to the baseline multiplier or by providing less of a compliant behavior benefit).

I examined cases originating from a *qui tam* and those cases which did not involve a *qui tam*. There were seventy-seven (65%) cases involving a *qui tam* and forty-one (35%) cases without a *qui tam*.[113] I ran a two-sample t-test to analyze the difference in means for the fifty-five (62%) of resolutions involving a *qui tam* for which I could identify the multiplier and the thirty-four (38%) of resolutions not involving a *qui tam* for which I could identify the multiplier.

The mean multiplier for cases involving *qui tams* ($M = 1.82$, $SD = 0.453$) was higher, but not significantly so, than the mean multiplier for cases which did not involve *qui tams* ($M = 1.72$, $SD = 0.442$), $t(87) = 1.066$, $p = 0.291$.

The incentives referenced above do not apply to the Commercial Litigation Branch, as the Commercial Litigation Branch does not have to be concerned about the distribution of cases among U.S. Attorney's Offices. All cases are filed with the U.S. Attorney General, and the Commercial Litigation Branch can always elect to participate in a filed case. As such, I also separately ran a two-sample t-test to analyze the difference in means for the thirty-one (58%) cases involving a *qui tam* and twenty-two (42%) cases without a *qui tam* among the cases handled by individual U.S. Attorney's Offices without the involvement of the Commercial Litigation Branch, and for the twenty-four (67%) cases involving a *qui tam* and twelve (33%) cases without a *qui tam* among the cases handled with the involvement of the Commercial Litigation Branch.

Among the cases handled with the involvement of the Commercial Litigation Branch, there was virtually no difference in multipliers (1.66 vs. 1.68) between the *qui tam* and non-*qui tam* groups. Among the cases led by individual U.S. Attorney's Offices without the involvement of the Commercial Litigation Branch, however, there was a greater difference in multipliers (1.95 vs. 1.74) between the *qui tam* and non-*qui tam* groups. With the small sample size, the difference was statistically significant at 10% level but not at 5% level.

Among cases handled by individual U.S. Attorney's Offices without the involvement of the Commercial Litigation Branch, the mean multiplier for cases involving *qui tams* ($M = 1.95$, $SD = 0.394$) was higher (significantly so at 10% level) than the mean multiplier for cases which did not involve *qui tams* ($M = 1.74$, $SD = 0.453$), $t(51) = 1.831$, $p = 0.069$.[114]

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[113] *Qui tams* account for roughly two-thirds of resolutions, despite DOJ's increased use of and investment in data analytics and other sources of case generation. *Qui tams* accounted for more than two-thirds of money ($2.1 billion out of $3 billion) recovered by DOJ through FCA cases in Fiscal Year 2019. *See* U.S. Dep't of Justice, Justice Department Recovers 2019, *supra* note 39.

[114] A table summarizing this data is included at Appendix 3.

This data is suggestive, but it is debatable whether the *qui tam* system is impacting the behavior of individual U.S. Attorney's Offices in resolving FCA matters, and this bears watching as new data becomes available and the sample size grows.

F. Can We Infer How DOJ Actually Treats Compliant Behaviors and Acceptance of Responsibility?

While I attempted to track references in DOJ's and defendants' public comments to compliant behaviors and acceptance of responsibility, the resolutions were insufficiently transparent as to these factors for statistical analysis to be appropriate. Unlike in criminal cases, where plea agreements contain the calculations under the U.S. Sentencing Guidelines, which make clear whether there was self-disclosure, cooperation, a sufficient pre-existing compliance program, and acceptance of responsibility, no such calculations are contained within CSAs. As such, my tracking of references to compliant behaviors and acceptance of responsibility are useful solely for purposes of anecdotal analysis.

This anecdotal analysis does have significant limitations due to the lack of DOJ transparency. It is not possible to know whether unknown factors explain some or all of what appear based on known factors to be unjustified results.[115] And where the anecdotal evidence comes in the form of public statements from settling defendants touting their compliant behavior rather than from DOJ, it is not possible to know whether DOJ disagreed with their claims.[116] Even with those limitations noted, the anecdotal evidence suggests, at best, inconsistent application of benefits for compliant behaviors.

There were some examples of defendants engaging in compliant behaviors and receiving below mean multiplier resolutions. Two defendants received multipliers of 1.0, and two other defendants received multipliers of 1.5 as part of resolutions where DOJ noted in press releases that the defendants had self-disclosed the misconduct or engaged in other compliant behaviors.[117]

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[115] This, of course, is the reason why DOJ's criminal resolutions have included detailed calculations, as described *supra* Section I.C. With such calculations visible, defendants—and the public—can see the impact of standard factors and are left with a narrower range within which unenumerated factors may have played a role.

[116] While statistical analysis would likely address on a global level any gaming of the percentage of total settlements allocated to actual damages in order to maximize a defendant's tax deduction, see U.S. DEP'T OF JUST., JUSTICE MANUAL § 1-18.300, it is possible such behavior could limit the descriptive value of an individual resolution. Gaming is unlikely to explain the anecdotes described below, however, as it would presumably result in lowering the multiplier for defendants who have cooperated with the government's investigation, while the anecdotes below, notably, do not reflect such a downward adjustment.

[117] Press Release, U.S. Dep't of Just., VCU Health System Authority Agrees to $4 Million Settlement (Sept. 25, 2018), https://www.justice.gov/usao-edva/pr/vcu-health-

Even some of those resolutions, however, make it clear that DOJ lacks a policy for calculating multipliers based on the facts of a specific case. In one of those resolutions, the U.S. Attorney noted that the 1.5 multiplier was given because of the defendant's self-disclosure and remedial measures and that otherwise, "the False Claims Act typically imposes liability for 3 times the amount of loss suffered by the government"—a statement at odds with my analysis finding no multipliers above 2.75, and only eleven above 2.0.[118] Similarly, in May 2019, the Principal Deputy Associate Attorney General trumpeted a March 2019 resolution in which a defendant was given what she referred to as a "discounted damages multiple of 1.7" as evidence that companies can benefit from cooperation.[119] It seems unlikely DOJ would have highlighted that "discount" if they understood it to have been a reduction of only 0.08 below the mean multiplier as a "credit" for "shar[ing] the results of its extensive internal investigation and also help[ing] the government assess its losses by developing a damages model."[120]

At the same time, there were at least as many instances of defendants receiving above-mean 2.0 multipliers despite clear evidence of substantial cooperation, including references to the defendant's cooperation in some of the CSAs and DOJ press releases.

As one clear example, a DOJ press release from February 2019 noted a defendant "discovered non-compliance problems internally. To their credit, they took corrective action, and they came forward to voluntarily disclose to the Government what had occurred."[121] But while the U.S. Attorney announcing the resolution went so far as to say that "[the defendant's] proactive approach in [the] case sets a good example for other providers who might find themselves facing similar issues," DOJ required the entity to pay a 2.0 multiplier—higher than the mean multiplier of 1.78.[122]

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system-authority-agrees-4-million-settlement [https://perma.cc/CU78-45PD]; Press Release, U.S. Dep't of Just., Ambulance Provider and Hospital Agree to Pay $1,425,000 to Settle Ambulance Transportation Claims (Feb. 23, 2018), https://www.justice.gov/usao-me/pr/ambulance-provider-and-hospital-agree-pay-1425000-settle-ambulance-transportation-claims [https://perma.cc/FF2Z-RTFT]; Press Release, U.S. Dep't of Just., Otsego Home Health Care Company to Pay More than $700,000 to Resolve False Claims Act Liability (Mar. 26, 2019), https://www.justice.gov/usao-mn/pr/otsego-home-health-care-company-pay-more-700000-resolve-false-claims-act-liability [https://perma.cc/P684-DUUH]; U.S. Dep't of Just., Medical Equipment Company, *supra* note 54; *see also infra* Appendix 1.

[118] U.S. Dep't of Just., Medical Equipment Company, *supra* note 54.

[119] McCusker Murray, *supra* note 78.

[120] *Id.*

[121] Press Release, U.S. Dep't of Just., Dynamic Therapy Services, LLC and PhysioHealth, Inc. to Pay $2 Million to Resolve Allegations of Improperly Billing TRICARE for Services Provided by Non-Authorized Providers (Feb. 25, 2019), https://www.justice.gov/usao-edpa/pr/dynamic-therapy-services-llc-and-physiohealth-inc-pay-2-million-resolve-allegations [https://perma.cc/KG3T-XUZ7].

[122] *Id.*

In another example, a DOJ press release from May 2018 noted the defendant "cooperated fully with [the] investigation," while the resolution required the entity again to pay a 2.0 multiplier.[123] In another, a Civil Settlement Agreement stated the defendant "cooperated with the government throughout its investigation," with the resolution again requiring the entity to pay a 2.0 multiplier.[124] In another, a DOJ press release from February 2019 stated the defendant "replaced the majority of its executive team [which would constitute a substantial remedial measure], conducted an internal investigation, and voluntarily disclosed significant amounts of information . . ." while the resolution required the entity to pay a 1.89 multiplier—again higher than the mean multiplier of 1.78.[125] Similarly, a DOJ press release announcing a resolution with a 1.79 multiplier praised the defendant company, stating "When violations are discovered, corporations should seek to immediately cooperate and resolve the allegations and minimize future risks, as [the defendant] has done here."[126]

In numerous other cases, defendants who received above-mean multipliers claimed in press releases or in statements to media that they had cooperated with the government's investigation, instituted remedial measures, or otherwise engaged in compliant behaviors.[127] In one of those cases, the company receiving a 2.0 multiplier

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[123] Press Release, U.S. Dep't of Just., Manhattan U.S. Attorney Announces $6.6 Million Settlement Against CityMD for Submitting False Claims to Medicare (May 4, 2018), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-66-million-settlement-against-citymd-submitting-false [https://perma.cc/5RSV-35F3]; Stipulation and Order of Settlement and Dismissal at 4, United States ex rel. Bevilacqua v. City Practice Group of New York, LLC, et al., No. 14 Civ. 9933 (KPF) (S.D.N.Y. May 3, 2018), https://www.justice.gov/usao-sdny/press-release/file/1060246/download [https://perma.cc/Q75R-FZAW].

[124] Federal Settlement Agreement at 4, United States ex rel. Cretaro-Williams v. Dermatology Associates of Central New York, PLCC, et al., No. 15-cv-00315-TJM-ATB, (N.D.N.Y. Nov. 30, 2018), https://www.justice.gov/usao-ndny/press-release/file/1117066/download [https://perma.cc/7KSW-SRXT].

[125] Press Release, U.S. Dep't of Just., Union General Hospital to Pay $5 Million to Resolve Alleged False Claims Act Violations (Feb. 6, 2019), https://www.justice.gov/usao-ndga/pr/union-general-hospital-pay-5-million-resolve-alleged-false-claims-act-violations [https://perma.cc/Q5GE-V4CB]; *see infra* Appendixes 1–3.

[126] Press Release, U.S. Dep't of Just., Skilled Nursing Facility Management Company Agrees to Settle False Claims Act Allegations (Feb. 5, 2019) https://www.justice.gov/usao-mdtn/pr/skilled-nursing-facility-management-company-agrees-settle-false-claims-act-allegations [https://perma.cc/3GQ6-B9M9]; *see infra* Appendixes 1–3.

[127] *See, e.g.*, Aaron Leibowitz, *Target to Pay $3M Over Unauthorized Pill Refills in Mass.*, LAW360 (Dec. 11, 2018, 5:34 PM), https://www.law360.com/articles/1110201 [https://perma.cc/ZLH8-9WVK]; Madisson Haynes, *HyperHeal to Pay over $400,000 for Unnecessary Hyperbaric Oxygen Therapy*, WUSA9 (May 31, 2019, 8:56 PM), https://www.wusa9.com/article/news/local/maryland/hyperheal-to-pay-over-400000-for-unnecessary-hyperbaric-oxygen-therapy/65-80c51bba-604e-4a2a-bc24-2454dfc1bf32 [https://perma.cc/ME2F-54GQ]; *Genesis Must Pay $1.88 Million to Settle Medicare Over-Payment Allegations*, WQAD8 (Mar. 27, 2018, 8:28 PM), https://wqad.com/2018/03/27/

stated that the wrongdoing "was brought to our attention, fully investigated and voluntarily reported to government authorities. . . . We have been fully cooperative with the government in the resolution of this matter, and have taken appropriate measures to correct these issues moving forward."[128]

This information appears at odds with DOJ's public position on the effects of defendants' cooperation on the settlement terms in FCA cases. Although the sample size is small, the results of my analysis are suggestive. At least without further information, it is difficult to square these results with the message of the FCA Guidance.

At the same time, several defendants received multipliers below 2.0 despite clear evidence that they did not even accept responsibility—never mind provide cooperation—regarding the alleged wrongdoing, and where there was no visible evidence of compliant behavior. Several of the defendants who received multipliers of 1.0—solely paying restitution without any additional payment to even cover the lost interest, cost of investigation, or relator's share, all of which must be taken into account under the FCA Guidance—affirmatively denied they had violated the False Claims Act.[129]

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genesis-must-pay-1-88-million-to-settle-claims-that-it-overbilled-patients/ [https://perma.cc/3CYU-J752]; *Rehab Center, Founders Agree to $1.3M Settlement in False Claims Case*, NEW HAVEN REG. (Apr. 27, 2018, 2:25 PM), https://www.nhregister.com/news/article/Rehab-center-founders-agree-to-1-3M-settlement-12869106.php [https://perma.cc/3WXL-FVUV]; John Commins, *Michigan Hospital to Pay $84.5M to Settle Stark Law, Kickback Claims*, HEALTHLEADERS (Aug. 3, 2018), https://www.healthleadersmedia.com/clinical-care/michigan-hospital-pay-845m-settle-stark-law-kickback-claims [https://perma.cc/V6PT-3RGL]; News Release, Beaumont, Beaumont Health Resolves Longstanding Investigation, Looks to Future (Aug. 2, 2018), https://www.beaumont.org/health-wellness/press-releases/beaumont-health-resolves-longstanding-investigation-looks-to-future [https://perma.cc/6DPF-AZZV]; Press Release, Medtronic, Medtronic Statement Regarding Recent DOJ Announcement (Dec. 4, 2018), https://www.medtronic.com/us-en/about/news/media-resources/medtronic-statement-regarding-doj.html; [https://perma.cc/5CNU-W6UD]; Susannah Luthi, *MedStar Pays $35 Million in False Claims Act Settlement*, MOD. HEALTHCARE (Mar. 21, 2019, 6:59 PM), https://www.modernhealthcare.com/law-regulation/medstar-pays-35-million-false-claims-act-settlement [https://perma.cc/764R-BN9B]; John Commins, *CareWell Urgent Care to Pay $2M to Resolve Upcoding Allegations*, HEALTHLEADERS (Apr. 1, 2019), https://www.healthleadersmedia.com/carewell-urgent-care-pay-2m-resolve-upcoding-allegations [https://perma.cc/4N2E-7BQ9]; *see infra* Appendixes 1–3.

[128] Amye Anderson, *Livingston Hospital Agrees to Settle False Claims Act Allegations*, UPPER CUMBERLAND BUS. J. (June 21, 2018), https://www.ucbjournal.com/livingston-hospital-agrees-to-settle-false-claims-act-allegations/ [https://perma.cc/SN67-W546].

[129] *See, e.g.*, Ayla Ellison, *Specialty Pharmacy Pays $17M to Settle Medicare Billing Fraud Suit*, BECKER'S HOSP. REV. (Feb. 5, 2019), https://www.beckershospitalreview.com/legal-regulatory-issues/specialty-pharmacy-pays-17m-to-settle-medicare-billing-fraud-lawsuit.html [https://perma.cc/D5QX-RUQV]; Marty Stempniak, *Vanguard Healthcare Will Pay $18M to Settle False Claims Act Allegations*, MCKNIGHT'S LONG-TERM CARE NEWS (Feb. 28, 2019), https://www.mcknights.com/news/vanguard-healthcare-will-pay-18m-to-

That is not necessarily to say the first group did not receive adequate credit for their cooperation—it is theoretically possible those multipliers would have been above 2.0 if not for their cooperation—or that there were no other reasons for the second group to receive below 2.0 multipliers. Due to the lack of DOJ transparency, it is not possible to know whether DOJ disagreed with these defendants' claims of engaging in compliant behaviors.

As discussed below, the lack of transparency is no less a problem than the apparent lack of consistency. If these resolutions do reflect a consistent rationale for determining multipliers in individual cases, including true cooperation or acceptance of responsibility benefit, the lack of transparency necessarily means they fail to adequately inform industry and the defense bar of the existence and extent of those benefits.

It was also notable that while there were some examples where DOJ noted a company's self-disclosure or cooperation, I did not find a single instance of DOJ even claiming to credit a company's pre-existing compliance program in determining the appropriate resolution of an FCA case. If this is reflective of DOJ not properly valuing the existence of a compliance program (and its lack of meaningful inclusion in the FCA Guidance was not inadvertent), that would be troubling, as it is the one compliant behavior aimed directly at stopping fraud before it occurs.

IV. POLICY IMPLICATIONS

Comparison of the criminal and civil schemes for resolving cases, particularly in conjunction with data analysis and anecdotal evidence, raises several issues and suggests there are structural problems with DOJ's handling of FCA resolutions. Notable amongst those issues are: DOJ's failure to utilize the top end of FCA exposure; over-incentivizing settlement and under-incentivizing acceptance of responsibility; and the lack of sufficiently detailed guidance and transparency to create appropriate uniformity across DOJ components and appropriately incentivize industry.

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settle-false-claims-act-allegations/ [https://perma.cc/AHE3-GA7Z]; Chris Marr, *Florida Skin Doctor to Pay $4M over Cancer Therapy Claims*, BL (Aug. 28, 2018, 2:53 PM), https://www.bloomberglaw.com/product/blaw/document/XFVU0DN0000000?criteria_id=a5649626283db2910425c258bf393b36&searchGuid=43e452c2-e2ee-4665-a92c-6613ce01c00d [https://perma.cc/H5Q8-6TE2].

U.S. DEP'T OF JUST., JUSTICE MANUAL § 4-4.112, ("The maximum credit that a defendant may earn may not exceed an amount that would result in the government receiving less than full compensation for the losses caused by the defendant's misconduct (including the government's damages, lost interest, costs of investigation, and relator share.").

A. DOJ's Failure to Utilize the Top End of FCA Exposure & Adequately Deter Corporate Health Care Fraud

The data calls into question whether DOJ is applying multipliers in a manner that maximizes deterrence and incentivizes compliant behavior. While treble damages plus penalties are available under the statute, the data makes clear that no one—neither the Commercial Litigation Branch nor any individual U.S. Attorney's Offices—is requiring even close to treble damages, never mind penalties, when resolving FCA cases through settlement.

DOJ made no use of the top end of potential FCA exposure in cases between early 2018 and June 2019—not only did none of the eighty-nine resolutions involve the imposition of penalties, but none had a multiplier higher than 2.75, only three were above 2.5, and only eleven above 2.0. For all of DOJ's statements about the power of the FCA to recover government money and deter fraud, the data calls into question whether, in many cases, DOJ's FCA resolutions accomplish either goal given the substantial incentives apparently being offered to defendants for settling their cases.

Commentators have debated the appropriate FCA multiplier for achieving general deterrence, but none have suggested a multiplier as low as seen in the data would achieve DOJ's deterrence objectives.[130] The debate has generally centered around whether the goal should be complete or optimal deterrence. Optimal deterrence is defined as calculating a penalty to compel a wrongdoer to fully internalize a victim's loss, including taking into account the likelihood that the wrongdoer might not have been discovered and that the victim might not take action because of the costs of investigation and prosecution, among other things.[131] Complete deterrence is defined as calculating a penalty to equal or exceed any potential gain to the wrongdoer from the wrongful conduct, taking into account the likelihood that the wrongdoer might not have been caught and held liable for the conduct.[132]

Some commentators have focused on the broader question of whether civil sanctions should be viewed as tools to compensate injuries and to "price" misconduct, rather than "prohibit" violations.[133] DOJ has regularly rejected the idea that health care fraud settlements are solely a "cost of doing business."[134] In the FCA

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[130] *See, e.g.*, Jost & Davies, *supra* note 38, at 279–80.

[131] *See id.* at 266.

[132] *Id.* at 268.

[133] *See, e.g.*, Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1538–51 (1984); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It*, 101 YALE L.J. 1875, 1876–77 (1992).

[134] *See, e.g.*, Press Release, U.S. Dep't of Just., Respironics to Pay $34.8 Million for Allegedly Causing False Claims to Medicare, Medicaid and Tricare Related to the Sale of Masks Designed to Treat Sleep Apnea (Mar. 23, 2016), https://www.justice.gov/opa/pr/respironics-pay-348-million-allegedly-causing-false-claims-medicare-medicaid-and-tricare [https://perma.cc/S3LZ-BGU6] ("We hope that those who commit fraud will recognize that

context, DOJ has claimed to utilize civil sanctions in a manner not meaningfully distinguishable from criminal sanctions—using consequences not only to take away any financial reward for engaging in health care fraud but to prevent the conduct completely.[135]

Timothy Jost and Sharon Davies examined this debate at length, concluding that "[b]ecause the level of auditing and enforcement in federal health care programs is very low, deterrence theory would seem to dictate that penalties imposed on providers who are found liable for fraud and abuse must be set very high before even optimal deterrence is achieved."[136] As a result, Jost and Davies took the position that in some cases, even treble damages and penalties are likely "too mild rather than too severe" and that "[t]o settle false claims cases routinely for significantly less 'than the legally authorized penalties' is to undermine even optimal deterrence and to risk encouraging improper billing."[137]

As noted above,[138] a large number of FCA settlements recovered no more—and often less—than the amount of damages plus interest. No complex analysis of economic incentives is necessary to conclude that such settlements do exactly what Jost and Davies warned against.[139]

Even putting deterrence aside, the gap between potential treble damages and penalties on the high end and single damages on the low end provides DOJ with an opportunity to offer meaningful rewards for compliant behaviors, and presumably to also take into account other factors laid out in both the FCA Guidance and the Corporate Prosecution Guidelines (e.g. "the nature and seriousness of the violation, the scope of the violation . . . the defendant's history of recidivism, the harm or risk of harm from the violation . . . ."). [140] But DOJ has, in practice, greatly narrowed that gap and limited its ability to meaningfully reward compliant behaviors among settling defendants.

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it is our goal to make the consequences more than just the cost of doing business." (quotation omitted)); *Fighting Fraud and Waste in Medicare and Medicaid: Spec. Hearing Before a Subcomm. of the Comm. on Appropriations*, 112th Cong. 35 (2011) (testimony of Tony West, Assistant Att'y Gen., Civ. Div., Dep't of Just.) (arguing that "[i]t cannot be that a company sees healthcare enforcement, law enforcement, imposing a fine as a cost of doing business.").

[135] *See* U.S. Dep't of Just., Justice Department Recovers 2018, *supra* note 41. *See also* Coffee, *supra* note 133, at 1876–77.

[136] Jost & Davies, *supra* note 38, at 279.

[137] *Id.* at 280, 308.

[138] *See supra* Section III.C.

[139] *See* Jost & Davies, *supra* note 38, at 308. While it is true that the settlement figure is not the only cost to defendants, and collateral costs may be substantial—costs of investigation, defense, remediation, and in some cases a Corporate Integrity Agreement ("CIA") with HHS-OIG—those costs (other than a CIA) are likely to apply regardless of whether the investigation discovers wrongdoing, thus eliminating its deterrent value, and there is no evidence in the data that DOJ used the existence of any such costs as a rationale for reducing the required multiplier.

[140] U.S. DEP'T OF JUST., JUSTICE MANUAL, *supra* note 53, § 4-4.120; Corporate Prosecution Principles, *supra* note 4.

B. Under-Incentivizing Compliant Behaviors & Over-Incentivizing Settlement

Given that DOJ does seek treble damages and penalties in the rare case when an FCA case goes to trial or is resolved on summary judgment, the results represent an enormous benefit for the simple act of settling. DOJ has provided a far greater benefit to defendants for resolving cases in the FCA context—even with defendants who rarely accept responsibility, and in many cases, affirmatively deny responsibility—than in the criminal context, where the act of pleading guilty brings with it an actual acceptance of responsibility.

Even if there is a benefit for compliant behaviors and acceptance of responsibility, they are dwarfed by the credit given for the simple act of settling. Under the U.S. Sentencing Guidelines, the reduction for a defendant organization's self-disclosure is five times the reduction for mere acceptance of responsibility, and the reductions for cooperation or for having had an effective compliance and ethics program in place are two times and three times the acceptance of responsibility deduction, respectively. The U.S. Sentencing Guidelines multiplier reduction for acceptance of responsibility is only 0.2-0.4—smaller than adjustments based on the size of the organization, and the role in the organization of the responsible individuals.[141] In the FCA context, where penalties are regularly more than the amount of the damages for each claim, it can conservatively be said that the government's forgoing of penalties and reduction of the FCA multiplier at or below 2.0 is a reduction of 2.0—five to ten times the reduction given in criminal cases.

Over-incentivizing settlement carries with it two powerful risks—the risk of under-deterrence in cases of true wrongdoing (addressed above with regard to DOJ's failure to utilize the top end of FCA exposure), and the risk of coerced settlements where defendants have not engaged in wrongdoing. While Jost and Davies's analysis of optimal deterrence theory and the FCA concluded that the latter was a more substantial problem, they noted the former was a primary grievance of industry.[142] For decades, industry and defense counsel have complained that the magnitude of FCA exposure creates an environment where defendants are vulnerable to "unfair and abusive" settlements.[143] Jost and Davies listed "coerced settlements" as one of the top "grievances" of FCA defendants, noting industry claims of "extortionate settlements."[144] Joan Krause took issue with Jost and Davies' dismissal of such concerns, arguing that Jost and Davies failed to account for cases where defendants lack the requisite intent for liability under the FCA but might be deterred from challenging the government's claims given the risk of an FCA judgment of trebles and penalties.[145] Krause expressed concern that the FCA structure was potentially

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[141] U.S. SENTENCING GUIDELINES MANUAL § 8C2.8 (2018).

[142] Jost & Davies, *supra* note 38, at 258, 310–11.

[143] *Id.* at 258.

[144] *Id.* at 264–65.

[145] Joan H. Krause, *Health Care Providers and the Public Fisc: Paradigms of Government Harm Under the Civil False Claims Act*, 36 GA. L. REV. 121, 207–08 (2001).

leading to coerced settlements—a concern that would surely be heightened by the newly revealed data.

Until now, the debate surrounding potentially coercive FCA resolutions and the appropriate settlement discount has taken place essentially in the dark, with no visibility as to how DOJ has resolved cases.[146] While the data provides even more reason for concern in this area—both for Jost and Davies's concern regarding under-deterrence and Krause's concern regarding coerced settlements—it also enables for the first time a conversation about the appropriate calculations grounded in reality rather than an abstraction.

Transparency will also allow for a public discussion of the appropriate standard multiplier to achieve deterrence, the magnitude of compliant behavior credit and the settling benefit, and whether, as some in industry and the defense bar have argued, it is so large as to force defendants to settle even if they strongly feel they did not engage in wrongdoing.[147]

If a settling benefit of this magnitude is truly DOJ's intention, transparency will benefit DOJ by setting clear expectations for defendants. It would also do much to counter skepticism amongst industry and the defense bar that meaningful credit for compliant behaviors is actually given. As is described above, there are many

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[146] Jost and Davies speculated that at least some U.S. Attorneys had settled FCA cases for far less than treble damages plus penalties, but were limited to only a few anecdotes. "A report of another recent settlement quoted a U.S. Attorney as stating that the case was settled by applying a multiplier of 2.1 to 2.5 times actual damages to reach the settlement, suggesting that at least some U.S. Attorneys have devised approaches to settling FCA cases for amounts far below the penalties legally available under the FCA." Jost & Davies, *supra* note 38, at 306 n.353 (referencing *Fraud and Abuse: Baltimore Hospital to Pay $827,000 to Settle Medicare Fraud Allegations,* HEALTH CARE DAILY REP. (BNA) (June 15, 1998) at d7, *available in* WL 6/15/98 HCD d7).

[147] *See* Krause, *supra* note 145, at 204 (citing Uwe E. Reinhardt, *Medicare Can Turn Anyone into a Crook*, WALL ST. J., Jan. 21, 2000, at A18); Timothy P. Blanchard, *Medicare Medical Necessity Determinations Revisited: Abuse of Discretion and Abuse of Process in the War Against Medicare Fraud and Abuse*, 43 ST. LOUIS U. L.J. 91, 114 (1999) (arguing that FCA's "threat of draconian . . . sanctions coerces providers into settlements regarding issues on which providers would likely prevail"); John T. Boese & Beth C. McClain, *Why* Thompson *Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 ALA. L. REV. 1, 18 (1999) (arguing penalty structure "places great pressure on defendants to settle even meritless suits"); Thomas S. Crane, *Health Care, Defense Industry Must Regroup Efforts to Reform False Claims Act*, HEALTH CARE FRAUD REP. (BNA) 1, 2 (Apr. 21, 1999) (arguing FCA penalties are among "the most abused tools in the government's arsenal to leverage exorbitant settlements"); William M. Sage, *Fraud and Abuse Law*, 282 JAMA 1179, 1180 (1999) (noting "large organizations have such a large stake in avoiding exclusion from Medicare that they readily settle pending charges, making much of fraud control resemble a rebate program more than a law enforcement exercise."); *see also* 42 U.S.C. § 1320a-7 (discussing the potential for HHS-OIG exclusion, which, in addition the the FCA damages consequences, puts enormous pressure on defendant companies to resolve cases amicably).

anecdotal examples of defendant companies who received above-mean multipliers despite having claimed in statements to the media or press releases that they had cooperated with the government's investigation, instituted remedial measures, or otherwise engaged in compliant behaviors.[148] With the lack of a calculation structure forcing industry and the defense bar to look to each resolution announcement to understand DOJ's analysis, such examples fit neatly with the narrative of some that DOJ does not provide the benefits it claims.[149] But it may be the case that DOJ disagrees that those entities provided cooperation in the investigation or otherwise engaged in compliant behaviors, or that other factors pushed those multipliers higher despite compliant behavior reductions. Transparency as to calculations would eliminate that basis for skepticism.

C. Under-Incentivizing Acceptance of Responsibility

To the extent FCA settlements are viewed as the result of prosecutorial coercion (rather than wrongdoing) or as nothing more than the cost of doing business for health care entities, DOJ's credibility and perceived legitimacy are put at risk.

As Joan Krause has written, "[t]he industry's distrust of FCA enforcement has important implications for the future of the health care anti-fraud agenda."[150] Krause focused on the question of whether DOJ was using the FCA to obtain settlements in cases where the conduct was not worthy of DOJ enforcement and noted the risk that industry would view DOJ enforcement under the FCA as inconsistently applied, potentially interfering with effective crime control.[151] Krause pointed to theorists regarding the importance of "perceived *legitimacy* and *moral credibility* of the law" and argued:

> [I]f health care providers come to believe that the law is being applied unfairly—that federal prosecutors are pursuing inappropriate cases,

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[148] *See* sources cited *supra* note 127. These more than half dozen examples of defendant companies received above-mean multipliers despite having claimed in statements to the media or in press releases that they had cooperated with the government's investigation, instituted remedial measures, or otherwise engaged in compliant behaviors.

[149] *See, e.g.*, Rebecca Martin & Sarah Walters, *Updated Yates Memo Still Has Force in Civil Domain,* LAW360 (Dec. 19, 2018, 11:20 AM), https://www.law360.com/articles/1111279/updated-yates-memo-still-has-force-in-civil-domain [https://perma.cc/9JJ7-PD6U]. This article by McDermott, Will & Emery attorneys, one of whom previously worked for DOJ, notes that there is an "enduring mystery about what 'credit' actually means in a practical, dollars-and-cents way" and that "the Yates Memo left practitioners scratching their heads regarding how the government actually quantifies 'cooperation credit' in FCA matters," moving forward. *Id.*

[150] Krause, *supra* note 145, at 127.

[151] *Id.* at 207–08 ("[L]egitimate providers whose activities fall within a regulatory gray area might well be more likely to fear the untoward effects of a fraud suit, and hence more likely to settle.").

> hoping defendants will settle rather than take their chances at trial—the legitimacy of the government's anti-fraud efforts may be questioned. Doubt as to the legitimacy of the government's efforts would likely lead to further industry non-compliance . . . .[152]

While Krause focused on her concern regarding "potentially staggering civil liability under the FCA"[153] and potential over-prosecution by DOJ—analysis of the now-available data raises an additional reason for worry regarding perception of legitimacy—DOJ has substantially rewarded settlement while being seemingly indifferent to actual acceptance of responsibility. With few exceptions, the FCA settlements examined did not include any admissions from the defendants and included language in the CSAs that "[t]o avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant . . . ."[154] Consistent with the CSAs, virtually all of the DOJ press releases announcing the FCA settlements included language to the effect that "[t]he [civil] claims resolved by the settlement are allegations only, and there has been no determination of liability."[155]

DOJ's policy of allowing companies to obtain the substantial settlement benefit in FCA cases while actively denying wrongdoing is, on its face, even more problematic than the much-maligned "neither admit nor deny" language, which is common in Securities and Exchange Commission resolutions. The SEC adopted the no-admit/no-deny policy itself out of concern that defendant denials would create "an impression that a [resolution was being entered into] when the conduct alleged did not, in fact, occur."[156] No-admit/no-deny has been criticized by courts and scholars because of its lack of admissions, leading to a change in SEC policy in 2013 to require admissions in some cases.[157] But DOJ currently does not even go so far as

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[152] *Id.* at 127–28 (citing PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 202 (1995)).

[153] Krause, *supra* note 145, at 216.

[154] *See, e.g.*, Federal Settlement Agreement at 4, United States *ex rel.* Cretaro-Williams v. Dermatology Associates of Central New York, PLCC, et al., No. 15-cv-00315-TJM-ATB, (N.D.N.Y. Nov. 30, 2018), https://www.justice.gov/usao-ndny/press-release/file/1117066/download [https://perma.cc/7KSW-SRXT].

[155] *See, e.g.,* U.S. Dep't of Just., Skilled Nursing Facility, *supra* note 126; U.S. Dep't of Just., Union General Hospital, *supra* note 125.

[156] *See* 17 C.F.R. § 202.5(e) (2018).

[157] *See, e.g.*, SEC. v. Bank of Am. Corp., 653 F.Supp. 2d 507, 512 (S.D.N.Y. 2009); SEC v. Citigroup Global Markets, Inc., 827 F.Supp. 2d 328, 332 (S.D.N.Y. 2011) (Rakoff, J.) (criticizing the SEC's former admissions policy because it deprives courts of assurance that the relief they are asked to impose has any basis in fact). While there is debate regarding the impact of the 2013 policy change, there is a striking difference in the attention paid to the debate over admissions in the context of SEC resolutions as compared to FCA settlements. *See* David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution that Wasn't*, 103 IOWA L. REV. 113, 122–26 (2017) (noting SEC's 2013 change in policy and

forbidding defendants from denying wrongdoing when resolving most FCA cases. This DOJ policy, too, fuels industry skepticism regarding the legitimacy of settlements and similarly weakens DOJ's efforts at general deterrence.[158]

Because FCA settlements have, in almost all cases, done nothing to prevent defendants from making public statements proclaiming their innocence, companies have publicly claimed their settlements were coerced and illegitimate.[159] As noted above,[160] several of the defendants who received multipliers of 1.0—solely paying restitution without any additional payment to even cover the lost interest, cost of investigation, or relator's share, all of which must be taken into account under the FCA Guidance—affirmatively denied they had violated the False Claims Act.[161] Both from a deterrence perspective and a legitimacy perspective, Congress and DOJ have recognized the harm which results from industry sentiment that FCA settlements are simply a cost of doing business, and have sought to push back on that view.[162]

D. Lack of Sufficiently Detailed Guidance & Transparency

Issuance of the FCA Guidance has sharpened the focus on how reductions from FCA multipliers are determined, but at the heart of the problem is a lack of guidance as to how multipliers should be determined in the absence of compliant behaviors. The data demonstrates that this has resulted in a lack of uniformity across the country, with U.S. Attorney's Offices—whether intentionally or unintentionally—seemingly calculating resolutions differently when the Commercial Litigation Branch is not involved. As DOJ has noted, consistency among prosecutors is critical to perceptions of fairness and is best accomplished through transparency—an important tool not only externally—to guide industry and the defense bar—but also internally, to ensure prosecutors are acting predictably. [163]

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questioning its impact).

[158] Ayla Ellison, *Identifying Trends in False Claims Act Enforcement*, BECKER'S HOSP. REV. (Nov. 25, 2014), https://www.beckershospitalreview.com/legal-regulatory-issues/identify-trends-in-false-claims-act-enforcement.html [https://perma.cc/4P64-YHAJ] ("For some in the healthcare industry, civil settlements are treated more like a cost of doing business than a true deterrent to fraudulent conduct." (quoting Shannon DeBra)).

[159] Robert Holly, *Encompass Health to Pay $48M to Settle False Claims Allegations*, HOME HEALTH CARE NEWS (July 1, 2019), https://homehealthcarenews.com/2019/07/encompass-health-to-pay-48m-to-settle-false-claims-allegations/ [https://perma.cc/KH6J-B8HT] ("'The evidence establishes that Encompass Health did nothing wrong,' [Mark Tarr, president and CEO of Encompass Health] said in a statement. 'But to stop this interminable investigation and avoid further expense, we decided it is in the best interests of Encompass Health and its shareholders to settle with DOJ and end the related litigation.'").

[160] *See supra* Section III.F.

[161] *See, e.g.*, Ellison, *supra* note 129; Stempniak, *supra* note 129; Marr, *supra* note 129.

[162] *See* U.S. Dep't of Just., Respironics to Pay $34.8 Million, *supra* note 134.

[163] *See* Global Investigations Review Live, *supra* note 12 ("Internally, at the Department of Justice, transparency helps define and refine the criteria prosecutors will apply to key

The potential that the *qui tam* system incentivizes U.S. Attorney's Offices to behave differently than the Commercial Litigation Branch, and may incentivize U.S. Attorney's Offices, in particular, to inadequately provide compliant behavior benefits, further demonstrates the need for a defined multiplier calculation structure.

DOJ's recent efforts to incentivize compliant behaviors through the transparency of the FCA Guidance cannot achieve its desired effect in its current state. The FCA Guidance laid out publicly, for the first time, the factors that might warrant a reduction in a multiplier, but it lacks specificity as to how such reductions should apply. And while the FCA Guidance notes that DOJ may "publicly acknowledge the entity's [] disclosure, other cooperation, or remediation" as an "additional avenue[] that would permit an entity [] to claim credit in FCA cases," without a policy of showing its work—laying out multiplier calculations in CSAs as they are in criminal resolution documents—industry and the defense bar have no means by which to judge the extent of the benefit received even where DOJ acknowledges compliant behaviors.

At a minimum, the analysis makes clear that if DOJ wishes to achieve its oft-stated goal of incentivizing business organization cooperation and investments in compliance programs, DOJ must increase the level of transparency and guidance—a fact DOJ has clearly understood when it comes to motivating compliant behaviors, self-disclosure in particular, in the context of the FCPA and other criminal prosecutions.[164] With the criminal-side trend towards increased transparency and defined benefits evident in the Corporate Enforcement Policy, the transparency gap between criminal and civil has been thrown into sharp relief.

Criminal DOJ officials have spoken explicitly about the need for transparency in resolutions in order to overcome industry skepticism. In a December 2019 interview with the Wall Street Journal, the Deputy Assistant Attorney General overseeing DOJ's Criminal Division pointed to transparency as DOJ's mechanism to show industry that DOJ is following its own guidance—"if we don't do that, the policies will ring hollow."[165] That is precisely the risk facing DOJ's FCA enforcement.

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decisions. . . . Having internal guidance that is both clear and clearly memorialized helps to ensure consistency and predictability in how those standards are applied within the Department.").

[164] *See generally* Peter R. Reilly, *Incentivizing Corporate America to Eradicate Transnational Bribery Worldwide: Federal Transparency and Voluntary Disclosure Under the Foreign Corrupt Practices Act*, 67 FLA. L. REV. 1683 (2015) (arguing, prior to issuance of the FCPA Pilot Program, that the government should be more transparent regarding specific and calculable benefits that can be achieved through self-reporting and cooperation in the face of FCPA violations).

[165] Dylan Tokar, *How the Justice Department Incentivizes Companies to Invest in Compliance*, WALL ST. J. (Dec. 24, 2019, 5:30 AM), https://www.wsj.com/articles/how-the-justice-department-incentivizes-companies-to-invest-in-compliance-11577183403 [https://perma.cc/6QDD-N6XB].

CONCLUSION

With changes in the tax law providing a glimpse into DOJ's handling of FCA settlements at the same time as DOJ's criminal prosecutors have moved aggressively and publicly towards increased transparency in rewarding compliant behaviors, DOJ's corporate enforcement is at a crossroads—DOJ must either increase the structure and transparency surrounding its handling of FCA matters or risk a further decline in industry trust in the fairness of DOJ policy. By documenting and applying a structure to the calculation of FCA settlements, DOJ has the opportunity to improve the relationship between DOJ and industry and create deterrence far beyond what can be achieved through individual enforcement actions. Without change in this area, DOJ risks undercutting its efforts at encouraging compliant behavior in one of DOJ's primary enforcement areas.

To the extent DOJ is already appropriately rewarding compliant behavior in civil FCA resolutions, adopting such a framework and including the math in public settlement agreements would come at no cost and would provide assurance of consistency among cases handled by the U.S. Attorney's Offices around the country. Revealing restitution figures while making no further comment on calculation methodology, however, will continue to lead to speculation and misinformation. Instead, DOJ should take the opportunity to reexamine its approach, both to how it calculates FCA settlements internally and as to its historic unwillingness to be transparent about its calculations. By adopting a structure of calculating the appropriate amount of civil settlements modeled, in general terms, on U.S. Sentencing Guidelines § 8C (including increases based on the severity of the misconduct and the level of those involved, and decreases based on compliant behavior and acceptance of responsibility, among other factors), DOJ can incentivize compliant behavior while also taking the opportunity to explain settlements to the public and industry.

DOJ is likely to be resistant to such a change not only because of institutional inertia but possibly also because of some of the same issues which have caused critics to question DOJ's use of the FCA—the currently large settlement benefit creates enormous pressure on defendants to settle. The lack of transparency allows the government to reduce settlement demands based on litigation risk without doing so explicitly and being forced to acknowledge publicly when it sees weaknesses in its litigation position.[166] But none of these grounds are a reason to avoid what would be a positive development, and DOJ has never publicly stated why it has avoided providing this information. The U.S. Sentencing Guidelines § 8C framework reduces fines by 20–40% based on acceptance of responsibility, and those percentages could be increased with regard to civil matters if that is viewed as

[166] Litigation risk might explain some of the resolutions with low multipliers where the evidence points away from there having been compliant behavior. Litigation risk as a silent factor would not explain the overall distribution of multipliers, however, as one would expect to see more resolutions with higher multipliers in cases without significant litigation risk.

desirable (as DOJ has done with cooperation and self-disclosure in the context of the Corporate Enforcement Policy on the criminal side). And an ideal calculation structure would allow for sufficient flexibility to permit consideration of litigation risk, just as the U.S. Sentencing Guidelines § 8C framework leads to a range with a maximum twice its minimum, and looks to a series of more amorphous factors to determine a specific fine within that range, or even beyond it in unusual cases.[167] The U.S. Sentencing Guidelines and the Corporate Enforcement Policy have not forsaken all art in the name of science, but provide sufficient transparency to allow both for discussion of the merits of various additions and reductions and to allow industry to engage in some calculation of risks and benefits.

If, on the other hand, DOJ is resistant because it has not been rewarding compliant behavior in resolving civil FCA cases, a change in this area is even more important. Doing so would constitute a short-term view—prioritizing short-term dollar recoveries (and press releases) over broad, long-term deterrence. Through an appropriate calculation methodology for FCA matters, DOJ can rectify the lack of appropriate incentives for compliant behavior currently present in the health care industry. Through transparency, DOJ can create a framework for an appropriate dialogue regarding the appropriate level at which compliant behavior should be rewarded, and the lack of compliant behavior should be punished.

[167] U.S. SENTENCING GUIDELINES MANUAL § 8C2.8 (2004) (includes factors that the court is required to consider under 18 U.S.C. §§ 3553(a) & 3572(a), in addition to other factors).

APPENDIX 1
HEALTH CARE FCA SETTLEMENTS

	All	Multiplier ID'd
All	118	89
Involved CLB	44 (37%)	36 (40%)
USAO-only	74 (63%)	453 (60%)
Qui Tam	77 (65%)	55 (62%)
No *Qui Tam*	41 (35%)	34 (38%)
Mean Multiplier[168]	n/a	1.78 (0.45)
Multiplier > 2.0	n/a	11
Multiplier = 2.0[169]	n/a	44
Multiplier < 2.0	n/a	34
Multiplier ≤ 1.5[170]	n/a	26
Q1	n/a	1.5
Median	n/a	2.0
Q3	n/a	2.0

APPENDIX 2
RESOLUTIONS INVOLVING CLB VS. USAO-ONLY (MULTIPLIER ID'D)

	Involved CLB	USAO-only
Multiplier ID'd	36 (40%)	53 (60%)
Mean Resolution	$34,857,974	$7,404,954
Mean for Multiplier ID'd[171]	1.66 (0.458)	1.86 (0.429)
Variance	0.21	0.18
p value[172]	0.037*	

[168] Value in parentheses is standard deviation.

[169] Multipliers were rounded to the nearest tenth for purposes of categorization. Thus, any multiplier below 2.05 but greater than or equal to 1.95 was considered 2.0 for purposes of categorization.

[170] Multipliers were rounded to the nearest tenth for purposes of categorization. Thus, any multiplier below 1.55 but greater than or equal to 1.45 was considered 1.5 for purposes of categorization.

[171] Values in parentheses are standard deviations.

[172] Significant at 5% level.

APPENDIX 3
USAO-ONLY RESOLUTIONS: *QUI TAM* VS. NO *QUI TAM* (MULTIPLIER ID'D)

	No *Qui Tam*	***Qui Tam***
Multiplier ID'd	22	31
Mean Resolution	$3,667,780	$10,057,142
Mean for Multiplier ID'd[173]	1.74 (0.453)	1.95 (0.394)
Variance	0.20	0.15
p value[174]	0.069	

[173] Values in parentheses are standard deviations.
[174] Significant at 10% level.